No. 84-1337

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In The

Supreme Court of the United States

October Term, 1984

In The Matter of

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., A NonProfit Section 501(c)(3) IRC, Benevolent Housing Corporation of the State of Florida, and MARY RIEDEL and RALPH MEYER,

Petitioners

v.

SAMUEL R. PIERCE, JR., SECRETARY OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and ALFRED HOFFMAN, JR., on behalf of MANDALAY ASSOCIATES, a Corporation to be formed,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The lawsuit involving the failure of the federal defendant to follow its own Regulations and National Public Policy in disposing of a valuable multifamily housing project at a price below its market value was dismissed by the district court on federal defendant's motion, on grounds of res judicata based upon issues which were not and could not have been incorporated in the prior complaint because they had not occurred and should not have occurred —

1. Is the district court decision in conflict with the Ninth Circuit case of Russell v. Landrieu, in determining HUD's statutory responsibilities?

2. Is the denial of judicial review by the circuit court in violation of Petitioners due process rights to a day in court?

3. Is the decision of the circuit court in conflict with the decisions of this Court and other Circuits by injecting new issue on appeal which was not raised by either party and then denying a motion for Rehearing and a suggestion for Rehearing en banc?

4. Is the refusal by the circuit court to follow its own Rules a denial of due process and access to the courts guaranteed by the Constitution of the State of Florida?

5. Is the decision of the 11th Circuit in conflict with the decisions of D.C. Circuit and the Fifth Circuit in Howes Leather Co. v. Carmen, and Hayes International Corp. v. McLucas, respectively, and with Bonner v. City of Prichard Alabama (5th Cir)?

(1) CERTIFICATE OF INTERESTED PERSONS - PARTIES

The parties named in the caption as petitioners and respondents.

The persons who are interested in the outcome of this case are as follows:

1. Mandalay Shores Cooperative Housing Association, Inc. ("MSCHA"), a nonprofit membership corporation, and its members. 2. The United States Department of Housing and Urban Development ("HUD") the Secretary of HUD, Samuel R. Pierce, Jr., and David Deutsch, Attorney for the Federal Defendant. 3. Jawdet I. Rubaii, Esq., Charles A. Medearis, Esq., Carlon M. O'Malley, Jr., William P. O'Malley, Esq., Clearwater, Florida, and Victor A. Altman, Esq. and the law firm of Krooth and Altman, Washington, D.C., attorneys for the Cooperative. 4. F. Wallace Pope, Esq. and the law firm of Johnson, Blakely, Pope, Bokor & Ruppel, P.A. Clearwater, Florida, counsel for Appellee Alfred Hoffman, Jr. 5. The trust held by the Bank of Clearwater whose beneficiaries are not known.

The Trial Judge was Senior District Judge Ben Krentzman.

(2) STATEMENT OF COUNSEL

I express a belief, based upon a reasoned and studied professional judgment, that the panel decision dated October 11, 1984, is contrary to the following decision of the Supreme Court of the United States: *Lutcher & Moore Lumber Co. vs. Knight*, 217 U.S. 257, 30 S.C. 505, 54 L. ed. 757 and that the panel decision is contrary also to 11th Circuit Rule 25 (a) - (d) inclusive and therefore contrary as well not only to the precedents of this circuit set forth in: *N.L.R.B. vs. Amalgamated Clothing Workers of America, AFL-CIO, L 990*, 430 F. 2d 966 (5th Cir. 1970) and *Matter of Perimeter Park Inv. Assoc., Ltd.*, 616 F. 2d 150 (5th Cir. 1980), but also to the precedents of the Supreme Court set forth in *Bounds v. Smith* 430 U.S. 817, 97 S. Ct. 1491, 52 L Ed. 2d 72, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

Carlon M. O'Malley, Jr.
and
William P. O'Malley
Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv-v
Opinions Below	1
Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	4
Reasons for Allowing the Writ	9
Introduction	9
I Petitioners due process rights violated by Panel injecting a new issue during oral argument which was not raised by either party and which did not appear in the record	7
II Panel procedure conflicts with Supreme Court decision in Lutcher & Moore Lumber Co., v. Knight	7, 12
A. Eleventh Circuit published rules require that opinion be rendered but were disregarded by affirmance without opinion and denial of timely Motion for Rehearing	9
B. Decision of Court below conflicts with the decision of Supreme Court and other Circuits and violates Constitutional right of due process	12
III Doctrine of Stare Decisis and Adjective Law has immediate application to case sub judice	14

IV HUD is bound by its own published Regulations and Rules and the Directive of Property Disposition Committee, but arbitrarily and capriciously disregarded its statutory duty..... 14

V Cooperative has standing to sue as a disappointed bidder - Conflict jurisdiction..... 15

VI Dismissal of Complaint by District Court without leave to amend complaint was error and misapplied res judicata principles of affirmative defense in conflict with Circuit Court decision and applicable F.R.C.P. 12 despite fact that no Answer had been filed.....

Conclusion..... 20

Appendix 1-A..... 1

Appendix 2-A..... A-4

TABLE OF AUTHORITIES

Cases	Page
Lutcher & Moore Lumber Co. v. Knight, 217 US 257, 30 S Ct 505	8
N.L.R.B. Amalgamated Cloth.WKRS of America AFL-CIO L990, 430 F.2d 966 (5th Cir. 1970)	9
Erie Ry. Co. v. Tomkins (1938) 304 US 64, 82 L Ed 1188, 58 S Ct 817	12
Anderson v. Wirkman 78 Mont. 187, 215 P. 224,227	13
1 Kent 477	13
24 A.L.R. 1215	13
Quaker Realty Co. v. Labasse, 131 La 996, 60 So.661,665, Ann.Cas 1914A, 1073	13
Moragne v. States Marine Lines, Inc., 398 US 375, 26 L Ed 2d 339	13
Service v. Dulles 354 US 363, 1 L Ed 2d 1403, 77 S Ct. 1152	14
Vitarelli v. Seaton, 359 US 535, 3 L Ed 2d 1012, 79 S Ct 968	14
Accardi v. Shaughnessy, 347 US 260, 98 L Ed 2d 618,74 S Ct 499	14
Yellin v. United States, 374 US 109, 10 L Ed 778, 83 S Ct 1828	14
Pacific Molasses Co. v. FTC 356 F 2d 386	14
Inland Steel Co. v. United States, 306 US 153, 83 L Ed 557, 59 S Ct 415	14
Howes Leather Co. v. Carmen, 680 F2d 818,820(D.C.Cir. 1982)	15
Hayes International Corp. v. McLucas, 509 F 2d 247,255(5th Cir. 1975)	15,16
Kinnet Dairies Inc. v. Farrow 580 F.2d 1260 (5th Circ. 1978)	15
Bonner v. City of Prichard Alabama, 661 F2d 1206 (11th Cir. 1981)	
FHA v. Burr, 309 US 242,245 (1940)	15
Citizens to Preserve Overton Park v. Volpe, 401 US 402,410 (1972)	16
Russell v. Landrieu, Secretary of HUD, 621 F 2d 1037 (9th Cir. 1980)	
Foman v. Davis, 371 US 178, 182 (1962)	16

Mineral Industries Inc., v. Occupational Safety, 639 F2d 1289, (5th Cir. 1981) 17
Hernandez v. City of Los Angeles, 624 F2d 1289 (5th Cir. 1980) 18
United States, Etc., v. Wiring, Inc., 646 F2d 1037, 1042 (5th Cir. 1981) 18
Concordia v. Bendekovic, 693 F2d 1073, 1075-6 (11th Cir. 1982) 18
Moch v. East Baton Rouge Parish School Bd., 548 F2d 594 (5th Cir. 1977) 19
Pennisi v. Alexander, 611 F2d 566 (5th Cir. 1980) 20

STATUTES
Administrative Procedure Act, 5 USC §§ 501-508 - 551-553, 702-706 3,13
National Housing Act, §207, 12 USC 1713*(l)* 2
United States Code, 42 USC 3535(o) and (o)(3) 3
12 U.S.C. 1702 15
28 U.S.C. 1652 12

REGULATIONS
Code of Federal Regulation
24 CFR Part 290, 290.3,290.53,290.55 Oct. 1, 1979 ... 14
Federal Register
56608
Vol. 44. No. 191/Monday, Oct. 1, 1979/ Rules and Regulations

CONSTITUTION
14th Amendment, U.S. Constitution 12
Art 1, Section 21, Constitution State of Florida 12

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On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit dated October 11, 1984 and November 21, 1984 respectively, denying without opinion the petitioner's appeal and Petition for Rehearing and Petitioner's suggestion for Rehearing En Banc, is reproduced in the Appendix at A-1.

The opinion of the United States District Court for the Middle District of Florida, Tampa Division is unreported and is reproduced in the Appendix at A-2.

SEPARATE APPENDIX

The opinion of the United States Court of Appeals for Eleventh Circuit dated February 18, 1982 is reported at 667 F.2d 1195(1982) and is reproduced in the Appendix at A-3.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered October 11, 1984 and timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed and such petition was denied on November 21, 1984 by an unreported order without opinion which is reproduced in the Appendix at A-1. No opinion was rendered in either Order. This Petition for Writ of Certiorari was filed within ninety (90) days following that date.

STATUTES AND REGULATIONS INVOLVED

This petition involves four statutes and one regulation and the application of local rules of the Circuit Court of Appeals for the Eleventh Circuit:

(1) Title 12 U.S.C. Section 1713*(l)* authorizes the Secretary of HUD to dispose of multifamily housing projects acquired as a result of a mortgage foreclosure where HUD has insured such a mortgage. This statute mandates that the Secretary of HUD must protect the interests of the United States and of the General Insurance Fund in making such dispositions. In the instant case the Secretary did not hold title to the subject property as a result of a mortgage foreclosure but acquired such title in settlement of a contested default in a HUD held purchase money mortgage given to a prior buyer.

The statutory requirement imposed on the Secretary in

making dispositions of multifamily housing projects acquired by the Department of HUD to protect the interest of the United States and of the General Insurance Fund requires that when such projects have been nationally advertised for sealed bid sale to the highest qualified bidder on express sales terms and conditions (such as occurred in the case at bar) that such sales terms and conditions must be strictly observed and performed in order to avoid any discrimination, favoritism, or unjust enrichment, because of the public trust involved.

(2) HUD's Property Disposition Committee authorized the sale of the subject multifamily housing project on definite and strict terms and conditions because of the controversial issues involved and because of the desireability of this Gulf-front, beach project for condominium conversion in Clearwater Beach, Florida. The advertised sales terms and conditions were disregarded by HUD after the bidding was closed and the sale was awarded to a disqualified bidder who failed to meet the sales terms and delayed the closing for six months because he lacked the funds to pay for the property. The terms of the sale to this buyer were entirely different than were advertised or bid on by the other bidders including the Petitioner. If such relaxed sales terms and conditions had been advertised the property would have sold for over double the amount actually received by HUD and this is proven by the mortgage of record in the amount of $13,800,000.00. HUD sold for $6,232,716. to a disqualified bidder who assigned his interest to others and he never closed the sale. The HUD Property Disposition Committee authorization of sale is reproduced in the Appendix at A-4

(3) Administrative Procedure Act ("APA") 5 USC Sec. 702-706, which sets the standards for administrative rulemaking and which provides for judicial review of administrative actions.

(4) 42 USC §3535(o)(3) which imposes specific requirements on HUD's administrative rule making, over and above and in addition to APA requirements.

(5) HUD's advertised sales terms and conditions as expressed in the HUD sales brochure and bid packet which bound all bidders and HUD to follow such terms and conditions of the advertised sale. HUD failed to follow its own sales terms and conditions in the challenged sale. A-12.

(6) HUD Regulations which establish the Previous Participation Review Committee (popularly called the 2530 Review Committee) were required by Congress to clean up the corrupt practices complained of in property dispositions by HUD and should not have been disregarded when the Committee issued a notice of disqualification of the purported high bidder in this case. A-5.

(7) HUD Regulations published at 24 CFR Part 290, which establish the procedures to be followed in disposition of HUD owned multifamily rental housing projects and under which the HUD Property Disposition Committee met and specifically authorized the disposition of the subject matter property and the terms and conditions of such disposition. A-6 The terms and conditions were advertised nationally but were changed after the bids were opened but only for the benefit of a disqualified albeit high bidder. Petitioners were not offered the same deal.

STATEMENT OF THE CASE

This case involves the rights of the Petitioners as a disappointed bidder to challenge the procedure utilized by the Secretary in disposing of the multifamily housing project which was held by HUD as FHA Project number 067-00016 pursuant to a settlement of a contested default in a HUD-held purchase money mortgage given by HUD to a prior buyer. The nationally advertised sales terms and conditions were amplified in HUD's sales brochure and bid packet and all bidders were required to demonstrate with their bids that they had the financial ability to close the sale within 60 days following any award by HUD to the qualified high bidder. In addition the sales terms were clearly stated in the specimen deed and included conditions of sale

which would if violated cause title to revert to HUD. Detailed plans and specifications covering the required renovation and rehabilitation of the project were provided to all prospective bidders and they were required to furnish a $2,800,000 performance bond at time of closing to assure HUD of their ability to make the required repairs and replacements and to remove toxic asbestos from the ceilings. Paramount condition of the sale was that the bidder had to pass the Previous Participation Review Committee requirements to be eligible as a buyer regardless of the amount bid. Another requirement was that the project must be maintained as a rental complex for at least twenty years after the sale. These sales terms and conditions were so stringent that the market value of the project was depressed substantially below its appraised value. A-14. However after the high bidder, Alfred Hoffman, Jr., was notified by the Previous Participation Review Committee that he was disqualified because of prior unsatisfactory HUD relations, A-5. HUD nevertheless proceeded to allow him over six months to solicit various investors to provide the necessary funds to acquire the property. The respondent, Hoffman, never did close the transaction because he assigned the contract made with HUD to others. The buyer, Bank of Clearwater never bid on the property and never passed the HUD Previous Participation Review Committee approval because the Previous Participation Review Committee was bypassed by the HUD official who handled the final closing. The sales terms and conditions were relaxed for the ultimate buyer and represented an entirely different deal than was advertised; A-13, so much so, that the purchase money mortgage of record stands at Thirteen Million Eight Hundred Thousand Dollars ($13,800,000.00) with a base interest percentage rate of only 12% while the conventional mortgage interest rate on commercial properties was quoted at about 17% per annum. This mortgage carries a floating rate of 2% over the New York Prime lending rate but allows any excess interest to be added to principal and deferred. This clearly indicates that the value of the property is greatly higher than the amount of the *nonrecourse* mortgage loan.

If the other bidders including the Petitioner herein had been af-

forded the same relaxed terms and conditions as were given to the buyer (Bank of Clearwater) A-13 the sales price to HUD would undoubtedly have been double the amount actually paid, a mere $6,232,716 less prorations and adjustments.

The Petitioner was not the highest "bidder," due to the stringent terms and conditions of the advertised sale, but may have been the *highest qualified* bidder pursuant to and in reliance upon the Secretary's written Directive to the HUD Area Manager of the State of Florida, Everett H. Rothschild, which was also mailed to the Petitioner, and dated October 23, 1979. The Petitioner offered HUD Seven Million Five Hundred Thousand Dollars ($7,500,000.00) with an earnest money deposit of 5% as required in the amount of $375,000 in the form of an irrevocable commercial bank letter of credit payable to the Secretary of HUD, on August 6, 1981 pursuant to the terms of the written Directive from the Secretary. This letter from HUD is reproduced in the Appendix at A-7.

HUD rejected this $7,500,000 offer despite the fact that HUD had the power and authority to reject any and all bids and to accept the offer more favorable to the United States and more representative of the value of the property. A-8 At the time HUD rejected the Petitioner's $7,500,000 bona fide offer HUD had not entered into any other contract for the sale of the property. In fact the sale contract made by HUD with Alfred Hoffman, Jr., was not executed by HUD until October 16, 1981. A copy of such contract is reproduced in the Appendix at A-9. Hoffman, Jr., was not a "qualified bidder" in any event. A copy of the Petitioner's $375,000 letter of credit in favor of the Secretary of HUD is reproduced in the Appendix at A-10 A copy of the petitioner's Offer of $7,500,000 is reproduced in the Appendix at A-11.

The Petitioner has always been ready, willing and able to acquire this project at the price offered of $7,500,000 on the same terms which were given to the Bank of Clearwater, a non bidder. The petitioner has standing to sue as a disappointed bidder.

I PETITIONER'S DUE PROCESS RIGHTS VIOLATED BY CIRCUIT COURT INJECTING A NEW ISSUE ON APPEAL WHICH WAS NOT IN THE RECORD AND WHICH CONFLICTS WITH SUPREME COURT DECISION

The Respondents, federal defendant and Alfred Hoffman, Jr., never challenged the Petitioner's ability to pay the price offered for the property being disposed of by HUD. There is no such issue raised in the record. To the contrary, the record shows that the Petitioner MSCHA was at all times material ready, willing and able to close the transaction at the appointed time.

During oral argument before the circuit court, however, Judge Vance injected an issue for the first time in this case, as to whether or not the Petitioner had the money to purchase the property. This new issue took the Petitioner's counsel by surprise and his impromptu reply was not responsive to the question. As a result the panel apparently concluded that the Petitioner lacked the financial ability to close and was not acting in good faith by causing a possible resale of the property by HUD if the relief requested were to be granted. This apparently prompted Judge Vance to remark that Counsel was getting "perilously close to sanctions" whereupon the Petitioner's counsel, visibly shaken, and unnerved, hastily sat down without providing Petitioner effectual representation or further argument. The Supreme Court has ruled on this specific issue (of injecting a new issue on appeal by the Court of Appeals) and has held such to be in violation of due process rights requiring a remand and reversal of the order below. The record of the proceedings in the Court below will disclose that the above described dialogue did in fact occur during Oral Argument. The Court has declined to provide a transcript of the proceedings but on request of the Supreme Court would probably comply. Unrelated third party attorney present also heard the statements made by the panel and has verified the contents of the notes taken at the hearing. The liklihood is strong that such issue (injected for the first time by the panel) significantly affected the Court's deci-

sion. *Lutcher & Moore Lumber Co., vs. Knight*, 217 U.S. 257, 30 S.Ct. 505, so clearly controls the error of injecting new issues on appeal, that extended analysis of the point is unnecessary.

If, "...in the Circuit Court of Appeals, ... the cause was disposed of by that Court 'on questions not raised by either party, and not considered when this cause was submitted,' "

then "...it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivilent to condemning them without affording them an opportunity to be heard." 30 S. Ct. at 509.

"...(I)n a case like this we think the judgment of the Circuit Court of Appeals must be reversed, and the case be remanded to that Court, to the end that the duty to hear and decide it may be performed." 30 S.Ct. at 510.

Denial of access to the courts is inexorably tied to the extraneous issue of 'ability to pay' which the panel injected for the first time at Oral Argument. In such circumstances re-hearing was warranted and was requested, but has been summarily denied, without opinion.

IIA. REASONS FOR ALLOWING THE WRIT

INTRODUCTION

The Eleventh Circuit declined to render any opinion despite the fact that the local rules of the Court require an opinion to be rendered. Rule 36 of the Federal Rules of Appellate procedure contemplates that some appeals will be decided without an opinion. But in Federal Courts where local rules have been adopted to delineate specific instances wherein opinions are not required, it has been instructively recognized[1] that such courts

> "...must - the word is must - never apply the rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used."

The Eleventh Circuit's local Rule 25 while similar in many respects to Rule 21 of the old Fifth Circuit seems a bit less restrictive than the old Fifth Circuit Rule 21 as quoted in footnote 2 of *N.L.R.B. v. Amalgamated Cloth.WKRS* (supra footnote 1) but despite the teaching of Judge Brown's analysis (above quoted) the Panel failed to render any opinion thus effectively depriving Petitioners of their due process rights to access to the courts. The panel was seeking to terminate this litigation and without causing the federal defendant the possibility of having to re-offer the housing project for sale with questionable result. The error of depriving the Petitioner of access to the courts for the imaginary convenience of the federal defendant cannot justify a violation of the petitioner's constitutional right to a day in court. Expedience is not a fair substitute for justice and justice delayed is justice denied.

The test of the Petitioner's ability to pay the price offered was prematurely conducted without opportunity to be prepared for the question. The question was not at issue and does not appear in the record. The Petitioner is and has always been ready,

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1. *N.L.R.B. v. Amalgamated Cloth.WKRS. of America, A.F.L.-CIO, L990*, 430 F.2d. 966 (5th Circ.1970)

willing and able to consummate the transaction and demonstrated that ability as was required at the time of its offer. There is nothing in the record to suggest otherwise. That issue was never before raised.

On reflection the Panel would have realized, if the issue had been briefed and was appropriate to be discussed at Oral Argument, that the subject property could readily be transferred to the Petitioner at no cost to HUD or to the other defendant. In fact HUD would be financially benefited by such transfer and the other defendant would suffer no loss of investment. That is clear from the record of the acquisition since the Bank of Clearwater has no financial exposure and no investment whatsoever. Neither do the trust beneficiaries since the purchase money mortgage exceeds the amount paid to HUD. Such mortgage also exceeds the total amount of purchase price and the rehabilitation costs. The mortgage is non-recourse and in the event of court ordered transfer or a voluntary assignment of title from the titleholder Bank of Clearwater, the Petitioner would take title subject to the mortgage lien of record without detriment to the holder of such lien. In such a case HUD would receive an additional amount of purchase price and be relieved of its obligation as contained in the deed of record to assume the liability of the mortgage in the case of reverter of title. The interest of the United States would be bettered.

Petitioner mentions these facts, without waiving its objections to the injection of this new issue by the Panel, and merely to show that if this issue had been properly raised in the court below, the Petitioner's ability to acquire title would not have been an issue, and the record would have reflected that the Petitioner has always been ready, willing and able, and that HUD would not have been exposed to the uncertainty of amount to be realized upon a resale of the property to the Petitioner. HUD would receive an additional amount of $1,276,284 from the Petitioner which is the difference between the amount received from the Bank of Clearwater and the amount offered to HUD by the Petitioner. HUD should have accepted the $7,500,000 offer from

the Petitioner, in any event, rather than the $6,232,716 paid by the Bank of Clearwater. It was not in the best interest of HUD, the General Insurance fund and the United States, whose interests the Secretary of HUD is bound to protect, 12 U.S.C. 1713*(l)* to dispose of this valuable project for an amount which did not approach the appraised value and was less than was offered in good faith by the Petitioner. This is especially true where HUD chose to sell to a disqualified bidder, whose bid was not supported, *as required*, by proof of his financial ability to close within the appointed period of time. The proof of his inability to meet the terms of the sale as advertised lies in the fact that he never had the funds to close at the time of his bid or at the time he entered into the contract to pay the purchase price. He never closed because he could not. He assigned his "option" to the Bank of Clearwater for an undisclosed consideration. These documents are of record and were recorded with the Deed so that HUD cannot disclaim knowledge of this irregularity and failure to follow HUD's own regulations, advertised terms and statutory requirements concerning such dispositions.

Depriving the Petitioner of "its day in court" amounts to no more than a cover up to avoid an unpleasant disclosure involving the antics of a federal agency regardless of the high cost to the United States in lost revenue from the sale of property in the National Domain. This violates the rights of the citizens and taxpayers of the United States and is a matter of great public interest, as well the rights of the Petitioners. Failure to allow the Petitioner its day in Court and the threat of sanctions against the Petitioner's counsel has a chilling effect on the constitutional rights of the Petitioners and violates Public Policy.

III PETITIONERS HAVE A RIGHT TO RELY ON PRIOR SUPREME COURT DECISIONS AND LONG ESTABLISHED ADJECTIVE LAW

Petitioners have a right to rely upon the decisions of the United States Supreme Court and long established adjective law[2] under the Doctrine of Stare Decisis[3]. Petitioners respectfully suggest that the Supreme Court should not tolerate disobedience to its Decisions and the rules of Appellate Procedure as laid down by the Supreme Court in cases to which such decisions apply. The Panel should not be permitted to inject new issues on appeal which are outside the record and which have never been raised by either party. This is particularly true where, as in this case, the Panel did exactly that which the Supreme Court has forbidden, *Lutcher and Moore Lumber Co., vs. Knight* (supra). To make matters worse the Panel avoided the issue by failing to render any opinion whatsoever, with the effect, that lacking any opinion the Petitioner would be impeded in its efforts to seek any further relief. That constitutes an egregious violation of the constitutional rights of the Petitioners to access to the courts and consequently violates the Petitioners due process rights guaranteed by the 14th Amendment of the United States Constitution and the Constitution of the State of Florida Article 1, § 21[4]. The Federal courts are bound by the laws of the States in which they are situated under the Supreme Court decision in *Erie Ry. Co. v. Tomkins*, 304 US 64 and the Rules of Decisions Act., 28 U.S.C. 1652, this also includes the organic laws of the States. The Petitioners have not had their "day in Court" and are entitled thereto.

The Court below was surprised to learn during Oral Argument that the Appellants (Petitioners herein) had not had their day in court. The Panel remarked that the Appellants should have their day in court but erroneously overlooked that in rendering their affirmance without any opinion. That error should have been corrected on the Petitioner's Motion for Rehearing and Suggestion for En Banc hearing. But it was not.

The Petitioners earnestly believe that if allowed to have their "day in court" the factual evidence which will be presented to the trial court will persuade the court to grant the relief requested. This can only be accomplished by a plenary hearing where testimony can be given and evidence adduced. The Petitioner's rights to be heard have been flagrantly violated and only this Honorable Court can correct this serious invasion of constitutional rights.

This Court should determine that the Petitioners are entitled to their day in court and that they are entitled to have a review of the Administrative decision involved in this irregular transaction by HUD, under the provisions of the Administrative Procedures Act, 5 USC §§ 551-553, 702-706. For these reasons the petitioners respectfully request this Court to Grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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fn. 2. "That part of the law which provides a method for enforcing or maintaining rights, or obtaining redress for their invasion." *Anderson v. Wirkman,* 67 Mont. 176, 215 P. 224, 227.

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3. "To stand by decided cases, to uphold precedents, to maintain former adjudications" 1 Kent,Comm. 477, 24 A.L.R.1215, *Quaker Realty Co., v. Labasse,* 131 La. 996,60 So.661,665,Ann.Cas. 1914A,1073: *Moragne v. States Marine Lincs Inc.,* 398 US 375, 26 L.Ed.2d 339.

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4. Fla. Const. Art. 1. § 21 expressly provides: "Access to the Courts. The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

IV FEDERAL AGENCY IS BOUND BY ITS OWN REGULATIONS AND PROCEDURES

HUD failed to observe and follow its own procedures and the Directive of the Property Disposition Committee as established in accordance with HUD's own published Regulations under 24 CFR Part 290 under which the subject disposition was authorized. A Copy of same is reproduced in the Appendix, A-4. HUD also failed to follow its nationally advertised terms and conditions of the sealed bid sale. A copy of the sales brochure which specified the terms of sale and the specimen deed and contract is reproduced in the Appendix, A-12. The deed and attachments of record clearly show the complete departure from the stringent terms upon which the Petitioners were required to bid. The Bank of Clearwater obtained relaxed terms which granted the title holder authority to subdivide, resubdivide, rent, sell, or in fact to do whatever is desired with the property. No other bidder including the Petitioner was given the slightest idea that such relaxed terms and conditions would be granted after the bids were opened. A-13.

"Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 US 363, 1 L Ed.2d 1403, 77 S Ct. 1152, *Vitarelli v. Seaton*, 359 US 535, 3 L. Ed 2d 1012, 79 S Ct 968; *Accardi v. Shaughnessy*, 347 US 260, 98 L Ed 681,74 S Ct 499; *Yellin v. United States*, 374 US 109, 10 L Ed 2d 778, 83 S Ct.1828; *Pacific Molasses Co. v. FTC*, 356 F2d 386; *Inland Steel Co. v. United States*, 306 US 153,83 L Ed 557, 59 S.Ct.415.

V COOPERATIVE HAS STANDING TO SUE

As a rejected bidder, Cooperative (Petitioner herein) has standing to sue where HUD materially changed the terms and conditions of sale in favor of one bidder, (who was in fact a disqualified bidder and should not have been considered in the first place.) Cooperative suffered injury in fact. *Howes Leather Co., v. Carmen,* 680 F2d 818,820 (D.C.Cir.1982). The "injury in fact" is defined as the economic loss suffered by the low bidder by virtue of its inability to obtain the contract. *Hayes International Corp. v. McLucas.* 509 F. 2d 247 255, (5th Cir. 1975). The Hayes case (p. 248) plainly stated that an "unsuccessful bidder" for a government contract had standing to sue to have the contract awarded to a competitor set aside as being in violation of the regulations of the Government Department. That decision is binding as a precedent for the Eleventh Circuit by virtue of *Bonner v. City of Prichard Alabama,* 661 F.2d 1206(11th Cir. 1981).

Further, in *Kinnett Dairies, Inc.* v. *Farrow,* 580 F.2d 1260 (5th Cir. 1978), the Circuit Court approved this principle, citing the *Hayes* case, *supra* (p. 1265), as adopting the approach taken by the D. C. Circuit in such cases.

The 1982 D. C. Circuit case of *Howes Leathers, supra,* ruled for the disappointed bidder whose complaint had been dismissed under Rule 12(b)(6) for failure to state a claim. *Howes Leather* held that where, as here, the disappointed bidder alleged violations by the Federal defendant of applicable statutes and abuse of discretion, such disappointed bidder should be given the opportunity to adduce facts to support its claim.

The Cooperative as a bidder is within the zone of interest protected by the National Housing Act (12 U.S.C. 1713 *(l)* and 1701z-11). That Act expressly authorizes suit against HUD in the broadest terms. 12 U.S.C. 1702. *F.H.A.* v. *Burr, supra.*

Finally, there is no legislative intent to withhold from Cooperative the standing to obtain judicial review of its Com-

plaint as a disappointed bidder that HUD's conduct was arbitrary and capricious. On the contrary, there is a strong presumption of reviewability. *Howes Leather Co.* v. *Carmen, supra*, at 821, citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).

VI *Cooperative Should Be Granted Leave To Amend The Complaint So That The Cause of Action Can Be More Fully Pleaded On The Basis Of Present Knowledge*

Liberal amendment should be granted to enable Cooperative to assert all viable claims arising from the facts as presently known. HUD and Hoffman filed motions for summary judgment and/or to dismiss, under Rule 12, F.R.C.P.

The review of such motions should be "lenient", and Cooperative should have the opportunity to adduce facts in support of its claims. *Howes Leather Co.* v. *Carmen, supra*, at 821. The policy under the Federal Rules of Civil Procedure is that "leave [to amend] shall be freely given when justice so requires." F.R.C.P., Rule 15(e).

As illustrated by this discussion, justice would be served through leave to amend because Cooperative has already demonstrated a viable cause of action. Amendment would permit the filing of additional pleadings to support this claim of improper bid administration. Such evidence includes the fact that bidder Hoffman as a beneficiary of the Land Trust Administered by Bank of Clearwater, raised the rents, in direct contravention of the advertised bid terms. This increased the value of the Project to Hoffman, to the detriment of Cooperative and other bidders who bid on the assumption that rents would not be raised for four years. Given the stated improprieties, this Court should permit Cooperative to seek redress for arbitrary, unlawful action by HUD and set aside the sale. Consistent with *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), amendment is properly granted in this case even though the complaint was dismissed. See

Mineral Industries, Inc. v. *Occupational Safety*, 639 F.2d 1289 (5th Cir. March 19, 1981) which stated that the Fifth Circuit has pursued a course of "strong liability" in allowing amendments (p. 1292).

The Court Below Should Not Have Decided The Res Judicata Issue Under The Present State Of The Pleadings And The Record

HUD filed no answer to the Complaint. Instead, HUD filed a motion under Rule 12(b)(1) and (6) to dismiss the suit and/or for summary judgment, on the grounds of (i) *res judicata* or (ii) failure to state a claim upon which relief can be granted. HUD did *not* file a motion for summary judgment under Rule 56 or affidavits. HUD did not file a Motion under Rule 8, setting up *res judicata* as an affirmative defense. Hoffman adopted HUD's pleadings. HUD filed only a Memorandum in support of its Motion.

The court below had before it no part of the record in the First Suit — not even the unpublished memorandum opinion of Judge Hodges. Nor did the court below even note that this Court affirmed that opinion without restating the issues decided by Judge Hodges. R. 134-6.** Hence, reference to Judge Hodges opinion was essential. The court below appears to have taken unwarranted judicial notice of First Suit and the other suits to which it referred. R. 352-4. The Cooperative objected to the Rule 12 motion, stating that *res judicata* is raised under Rule 8(c) as an affirmative defense and should be set forth in the answer. R. 152-3.

The district court ruled on HUD's motion stating "...that this case should be DISMISSED." R. 351. It thus granted HUD's Motion for Dismissal and did *not* grant HUD's Motion for Summary Judgment.*

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* The court could not have granted summary judgment because HUD admitted there were disputed factual statements in the Complaint. R. 105.

** Any record references in this person are references to the record that will be furnished if certiorari is granted.

A. *Burden of Proof*

Res judicata is an affirmative defense which should be pleaded under Rule 8 and proved by the party claiming same. Since the issue will require facts which are outside the Complaint, the pleading should be supplemented with applicable affidavits. Under Rule 8, the burden of proving the affirmative defense of *res judicata* rests upon the party asserting it.

Thus, in *Hernandez* v. *City of Los Angeles*, 624 F.2d 935 (9th Cir. 1980), the Ninth Circuit stated (p. 937):

> "The burden of pleading and proving the identity of issues rests on the party asserting the estoppel. [Cit. omitted] To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the issues litigated in the prior action."

The Fifth Circuit follows the same "general rule" expressed by the Ninth Circuit in the *Hernandez* case, namely that "one who asserts the existence of an affirmative defense has the burden of proving that defense. . . ." *United States, etc.* v. *Wiring, Inc.*, 646 F.2d 1037, 1042 (5th Cir. June 1, 1981), reh. denied August 12, 1981.

HUD has not carried its burden or proof. It submitted no evidence in support of its motion which was only a few lines long. HUD's unsworn Memorandum is not evidence. *Concordia* v. *Bendekovic*, 693 F.2d 1073, 1075-6 (11th Cir. 1982).

B. *Motion To Dismiss Under Rule 12*

The court below had before it only the motion to dismiss and/or for summary judgment under Rule 12. There was no motion for summary judgment under Rule 56, F.R.C.P. The court below failed to require HUD to file affidavits or to treat the motion as one for summary judgment. Its decision treated HUD's motion as a motion for dismissal and granted dismissal of the suit. In so doing, the court below proceeded to decide the affirmative defense of *res judicata*.

This procedure is in error and grounds for reversal. *Moch* v. *East Baton Rouge Parish School Bd.*, 548 F.2d 594 (5th Cir. 1977), cert. denied 434 U.S. 859 (1977). The Fifth Circuit pointed out (p. 596) that a party cannot base a 12(b)(6) motion on *res judicata*, which must be pleaded as an affirmative defense. [The one exception noted in *Moch* is inapplicable here since the trial court did not treat HUD's Motion as one for summary judgment.] The decision is controlling in the Eleventh Circuit. *Bonner* v. *City of Prichard, Alabama, supra.*

C. *The Record Of The First Suit Is Essential.*

Since the Moch case, both the Fifth Circuit and this Circuit, as well as other circuits, have greatly increased the strictness of proof required to succeed with the affirmative defense of *res judicata*. In *Pennisi* v. *Alexander*, 611 F.2d 566 (5th Cir. 1980), the Secretary of the Army moved under Rule 12(b)(6) to dismiss on grounds of *res judicata*. The decision of the district court was reversed because the record on appeal did not contain the Complaint in the first action. The dismissal order in the first action was deemed insufficient. The case was remanded with instructions that "...the parties should be given the opportunity to litigate the merits of the affirmative defense of *res judicata*." P. 567.

In the instant suit, no pleading from First Suit is in the record on appeal.

This Circuit has applied very strict rules in pleading and proving *res judicata*. *Concordia* v. *Bendekovic, supra.* Thus, before an action may be summarily dismissed on the ground of *res judicata*, the ends of justice require as a minimum that the defense of *res judicata* appear from the face of the complaint or that the record of the prior case be received in evidence. (P. 1075) To satisfy the minimum requirement that the defense of *res judicata* appear from the face of the complaint (P. 1077) requires that "certified or exemplified copies of the pleading record or judgmental material" be presented to the Court. (P. 1076)

In the instant decision, the district court had before it no such documents from the First Suit. Accordingly, its decision violates *Pennisi* v. *Alexander, supra,* and *Concordia* v. *Bendekovic, supra.*

CONCLUSION

This Petition demonstrates that The United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with decisions of this Court and other Courts of Appeal. The issue in this case present important problems of federal law and matters of great public interest and National importance in HUD's disposition program of its many HUD-held projects in the several states. The need for a National Policy on such sales or dispositions is great. The Eleventh Circuit decision in affirming without an opinion the arbitrary and capricious actions of HUD has created a conflict among the Circuits. For these reasons, Petitioner respectfully requests this Court to grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted this 19th day of February, 1985.

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and
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing Petitioner's Brief and Record Excerpts was duly served, by U.S. First Class Mail, postage prepaid, this 19th day of February, 1985, to the following:

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3559

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., etc., and MARY RIEDEL and RALPH MEYER,

Plaintiffs-Appellants,

versus

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL R. PIERCE, JR., Secretary of HUD, and ALFRED HOFFMAN, JR., on behalf of MANDALAY ASSOCIATES, A Corporation to be formed,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

(October 11, 1984)

Before FAY and VANCE, Circuit Judges, and MacMAHON*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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* Honorable Lloyd F. MacMahon, U.S. District Judge for the Southern District of New York, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3559

U.S. Court of Appeals
Eleventh Circuit
FILED November 21, 1984
SPENCER D. MERCER, Clerk

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., etc., and MARY RIEDEL and RALPH MEYER,

Plaintiffs-Appellants,

versus

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL R. PIERCE, JR., Secretary of HUD, and ALFRED HOFFMAN, JR., on behalf of MANDALAY ASSOCIATES, A Corporation to be formed,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 11, 1984, 11 Cir., 1984, _____F.2d_____).
(November 21, 1984)

Before FAY and VANCE, Circuit Judges, and MacMAHON*, District Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Fay
United States Circuit Judge

* Honorable Lloyd F. MacMahon, U.S. District Judge for the Southern District of New York, sitting by designation.

4-A

2-A

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

FILED July 20, 10:19 AM

Case No. 81-1187 Civ-T-BK

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., (a Florida not-for-profit corporation) and MARY RIEDEL, and RALPH MEYER,

Plaintiffs,

vs.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL R. PIERCE, JR., Secretary of HUD and his successor or successors in title of FHA Project Number 067-00016, otherwise known as Mandalay Shores Apartments, and ALFRED HOFFMAN, JR., on behalf of Mandalay Associates, a corporation to be formed,

Defendants.

ORDER

The Court has for consideration defendants' motion to dismiss or for summary judgment.[1] Defendants raised two arguments in support of their motion. First, they contend that all or part of this case is precluded by the principles of res judicata. Second, even if the case is not precluded by previous litigation between some of these parties, defendants argue that plaintiff has failed to state a claim in this suit upon which relief can be granted.

1/ The motion was initially filed by defendants United States Department of Housing and Urban Development, and Samuel R. Pierce, Jr. (the federal defendants). Defendant Hoffman adopted the motion of the federal defendants. Hoffman also asserted that he is in privity with the federal defendants as subsequent purchaser of the property in question.

This is one of a series of actions filed within the last three years concerning the sale of the Mandalay Shores Apartments. The facts have been recited by this and other courts. *See Mandalay Shores Cooperative Housing Association v. Pierce, et al,* 80-356 Civ-T-H (M.D.Fla., order dated April 12, 1981), *aff'd* 667 F.2d 1195, *cert. denied* 103 S.Ct. 446 (1983); *Mann v. United States Department of Housing and Urban Development, et al.,* No. 81-288 Civ-T-K (M.D.Fla. order dated September 2, 1982) *aff'd* No. 81-5901 (11th Cir. March 28, 1983). The facts can be summarized as follows.

The Mandalay Shores Apartment complex was acquired by the Department of Housing and Urban Development (HUD) after default by previous mortgagors. The Department was interested in selling the complex. A group of residents were interested in buying the apartments and formed the Mandalay Shores Cooperative Housing Association (MSCHA) as a nonprofit corporation to facilitate the purchase. HUD and the resident's association attempted to negotiate a sale and purchase, but the Department's Property Disposition Committee felt that a sale by public bid was the best manner of disposition. HUD eventually accepted a bid by Mandalay Associates, a corporation formed by defendant Hoffman. Plaintiffs allege that even though they were the highest bidders, HUD accepted the lower offer of defendant Hoffman's group.

When it appeared that HUD would not accept its bid, MSCHA embarked on an extensive course of litigation. The opening salvo in federal court was in *Mandalay Shores Cooperative, et al. v. Pierce, et al.,* No. 80-356 Civ-T-H (M.D.Fla.). There, plaintiffs challenged the methods by which the Secretary of HUD refused to accept MSCHA's original offer and decided to put the complex up for public bids. The district court ruled that the relevant statutes used in that case gave the Secretary discretion in deciding the method for disposing of the complex. *Id., order dated April 12, 1981.* Plaintiff's have not prevailed on appeals from that ruling. *Id.,* 667 F.2d 1195 (11th Cir. 1983) *cert. denied* 103 S.Ct. 446.

In the second suit in federal district court, plaintiffs relied on several theories to block the impending sale to defendant Hoffman's corporation. *Daniel E. Mann, et al., v. United States Department of Housing and Urban Development, et al,* No. 81-288 Civ-T-K (M.D.Fla.). MSCHA sought damages and in-

junctive relief against HUD and several other defendants based on the presence of asbestos in the apartment ceilings. This Court held that subject matter jurisdiction was not present for any of the many federal statutory or constitutional provisions relied upon by MSCHA in that suit. *Id., order dated September 2, 1982.*

Plaintiffs also sought to block the sale of the apartment complex in United States Bankruptcy Court. *MSCHA, et al v. Pierce, et al.*, No. 81-547 (Bankruptcy Court, M.D. Fla.). Because identical issues were before two separate federal district courts, the Bankruptcy Court dismissed the cases on abstention principles.

Plaintiffs then filed this suit. In an eight count complaint, plaintiffs once again ask a court to intercede in their struggle to buy Mandalay Shores from HUD. This time, plaintiffs recognize that the complex has already been sold, and ask the Court to rescind the contract between HUD and defendant Hoffman's group. Plaintiffs add a new claim in this suit, alleging discrimination against aged and handicapped residents by HUD's refusal to sell the complex to MSCHA. *Complaint*, Count V.

Despite any new permutations in this suit, the principles grouped under the label of "res judicata" clearly mandate that this case should be dismissed. As the term is used today, res judicata refers generally to the preclusive effects of judgments in civil actions. One of the sub-principles of res judicata is now called "claim preclusion" or "true res judicata." Once a judgment is rendered, that judgment is the full relief to be accorded between the same parties on the same "claim" or "cause of action." *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535 (5th Cir. 1978); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

It is clear that the present suit involves the same "claim" or "cause of action" which was before this Court and another federal district court. There is no hard and fast definition for a "claim" which will be precluded by a previous adjudication. *See Restatement 2d, Judgments § 24 (1981).* The liberal rules for pleadings, joinder and amendments found in the Federal Rules of Civil Procedure envision that a litigant will bring all his or her claims in one suit. Because of this liberality, the rules developed concerning claim preclusion have rigorously restricted the opportunity for relitigation. *Id., pp 5-13.* Regardless of the defini-

tion given to a "claim" which is precluded by prior litigation, it is clear that changing the theory or ground for relief is not the presentation of a new "claim." *Id.*, § 25(d); *Carr v. United States*, 507 F.2d 191, 193 (5th Cir. 1975) *cert. denied* 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1976). Here, plaintiffs have merely tinkered with the theories underlying their ultimate claim, the attempt to force HUD to sell the complex to the resident's association. While the theories are slightly changed, this is the same claim which should be precluded by the previous judgments.

It is also clear that the presence of some new parties on either side of this case does not block the preclusive effects of the prior judgments. Mary Riedel and Ralph Meyer are new plaintiffs in this action who were not named as parties in previous suits involving Mandalay Shores. They are long-time residents of the complex. Alfred Hoffman, Jr. bought the complex from HUD and is named as a new defendant. Generally, nonparties are not precluded by prior litigation involving the same claim. The major exception to this rule extends the preclusive effects to nonparties who were represented by the parties to the earlier suits. When an association represents the interests of its members, the preclusive effects of previous judgments apply to each member of the association. *18 Wright, Miller & Cooper, Federal Practice & Procedure*, § 4456 (1980). Here, plaintiffs have shown no dissimilarity between the interests of Riedel and Meyer and MSCHA. Likewise, it is clear that defendant Hoffman is in privity with previous defendants by virtue of his ownership of the complex.

In conclusion, the Court is of the opinion that the claim or cause of action involved in this suit was adjudicated at least one time previously by this or another federal district court. Plaintiffs should have brought all their claims in the first action, as required by the Federal Rules of Civil Procedure. Because they failed to do so, the doctrine of claim preclusion covered by the field of res judicata dictates that this case should be DISMISSED. Accordingly, defendants' motion should be, and is hereby GRANTED.

IT IS SO ORDERED at Tampa, Florida this 20 day of July, 1983.

BEN KRENTZMAN
SENIOR UNITED STATES
DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS, CLERK

No. 84-1337

In The

Supreme Court of the United States

October Term, 1984

In The Matter of

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., A NonProfit Section 501(c)(3) IRC, Benevolent Housing Corporation of the State of Florida, and MARY RIEDEL and RALPH MEYER, *Petitioners*

v.

SAMUEL R. PIERCE, JR., SECRETARY OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and ALFRED HOFFMAN, JR., on behalf of MANDALAY ASSOCIATES, a Corporation to be formed, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SEPARATE APPENDIX ON PETITION FOR WRIT OF CERTIORARI

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APPENDIX INDEX

	Number	Page
Order Affirming Court Below and Denial of Motion for Rehearing	A-1	1-A, 3-A of Petition
Order by Judge Krentzman, U.S. District Court Middle District Florida, Tampa Division	A-2	4-A, 7-A of Petition

SEPARATE APPENDIX

Opinion Order entered February 18, 1982 11th Circuit	A-3	8-A, 10-A
HUD Property Disposition Committee Directive Memorandum	A-4	11-A, 18-A
Notice of Disqualification of Alfred Hoffman, Jr., by HUD Previous Participation Committee	A-5	19-A
HUD Regulations, 24 CFR 290 et seq	A-6	20-A, 46-A
HUD Directive to Area Manager dated October 23, 1979	A-7	47-A, 48-A
HUD rejection of MSCHA $7,500,000 offer and $375,000 earnest money deposit in form of Bank letter of credit	A-8	49-A, 53-A
HUD/Hoffman Contract of Sale and Purchase (All Cash) dated October 16, 1981	A-9	54-A, 61-A
First National Bank of Chicago $375,000 irrevocable Commercial Letter of Credit payable to Secretary of HUD	A-10	62-A, 63-A
MSCHA $7,500,000 Offer to purchase to HUD	A-11	64-A, 72-A
HUD Sales Brochure and Advertisement	A-12	73-A, 76-A
HUD Deed of record showing changed sales terms in favor of Bank of Clearwater as Grantee	A-13	77-A, 84-A
HUD Specimen Deed "APPENDIX "A" of HUD Bid Packet as bid on	A-14	85-A, 89-A

Appeal from the United States District Court for the Middle District of Florida.

Before HILL, Circuit Judge, SMITH**, Judge, and HENDERSON, Circuit Judge.

SMITH, Judge:

Appellant, Mandalay Shores Cooperative Housing Association, Inc. (cooperative), appeals a judgment of the United States District Court for the Middle District of Florida, denying appellant's motion for a preliminary injunction and granting appellee's motion for summary judgment in favor of appellees, Samuel R. Pierce, Jr., et al., Department of Housing and Urban Development (hereafter HUD). Appellant requests (1) that HUD be enjoined from selling Mandalay Shores Apartments of Clearwater, Florida (the project) until the present litigation is finally completed and (2) that the case be remanded to the district court in order that material issues of fact present may be litigated. The project is one to which HUD acquired fee simple title in 1977 after the second of two defaults on the mortgage. The cooperative is a nonprofit corporation formed by a number of the tenants of the apartments, for the purpose of negotiating a purchase of the project. In its memorandum opinion the district court held that HUD, acting through its Property Disposition Committee, did not exercise discretion in an arbitrary and capricious manner in rejecting appellant's offer of purchase. We denied the motion for injunction in July 1981 and, after hearing oral arguments, we denied appellant's request that we stay HUD's opening of competitive bids on the project and, subsequently, that a closing of sale scheduled for December 16, 1981, be stayed, *pendente lite*. After giving full consideration to the parties' arguments, briefs and other submissions, and the record, we affirm the decision of the district court as contained in its memorandum opinion dated April 2, 1981.

**Honorable Edward S. Smith, Judge for the U.S. Court of Claims, sitting by designation.

Appellant claims that the district court made a number of errors; however, since we affirm the lower court's decision and analysis of the issues it discussed we note briefly only those issues which the lower court did not directly address.

[1] First, appellant claims that a provision in leases which its members entered into with the receiver in Bankruptcy of the project requires HUD to sell the project to appellant. The leases stated that

> Should the Landlord announce in writing an intention to submit the***[project] to a plan of cooperative or condominium ownership,***[t]enant herein will be given first option to purchase the apartment at the price and upon terms set forth in any such plan.

Even viewing the clause as binding on HUD, it is not enforceable since HUD decided that the project should remain a rental property.

[2] Second, appellant argues that under the doctrine of equitable estoppel HUD is required to negotiate with the cooperative. Appellant's only plausible basis for this claim involves a meeting between representatives of appellant and Marilyn Melkonian, the then Deputy Assistant Secretary for Multifamily Housing Programs of HUD, who appellant alleges assured the cooperative that HUD would negotiate exclusively with it for the sale of the project. Ms. Melkonian submitted an affidavit which stated that she never made any such assurances. However, even if she made such a statement and even if the regulations[1] modifying the procedure for selling unsubsidized projects to tenant cooperatives are, as appellant claims, invalid, appellant still does not have a cause of action. The regulations which the contested regulations superseded restricted to the Property Disposition Committee the authority to transfer multifamily projects.[2] Therefore, since unauthorized actions by HUD

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[1] 24 C.F.R. §§ 290.7, 290.53(c) (1981); 44 Fed. Reg. 56,609 (1979).
[2] 24 C.F.R. § 290.40 (1981).

officials could not bind the agency and since appellant is deemed to have notice of the officials' limited authority, appellant offers no grounds for application of equitable estoppel.[3]

[3] Finally appellant claims that the amendment to 12 U.S.C. § 1701z-11(c)[4] contained in the Housing and Community Development Act of 1980[5] somehow affects the parameters of the Secretary's discretion in disposing of HUD projects. Nothing in the statute or the legislative history of the act[6] gives appellant grounds for that belief. The amendment does not change, in any way relevant here, HUD's discretion as to how to dispose of the project.

[4] Appellant has not demonstrated that there are material issues of fact to be litigated. "[W]hen a movant makes out a convincing showing that genuine issues of fact are lacking, we require *** [in order to deny a motion for summary judgment] that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists ***"[7] (Footnote omitted.) We hold that there are no remaining genuine material issues of fact in this case and, therefore, the decision of the district court is

AFFIRMED.

---

[3] See *Housing Corp. of America v. United States*, 199 Ct.Cl. 705, 711, 468 F.2d 922, 925 (1972).

[4] 12 U.S.C. § 1701z-11(c)(3) (Supp. IV 1980) reads, in part "(c) *** the Secretary shall seek to *** (3) maintain the project for purposes of providing rental or cooperative housing for the longest feasible period."

[5] Pub.L. No. 96-399, 94 Stat. 1614 (1980).

[6] H.R. Conf. Rep. No. 1420, 96th Cong., 2d Sess. 107, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3506, 3617, 3652.

[7] *Bruce Constr. Corp. v. United States*, 242 F.2d 873, 875 (5th Cir. 1957).

A-4

MEMORANDUM

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

Date: 29 Sep 1980

To: Chairman, Property Disposition Committee

From: Robert P. Kalish, Office of Multifamily
Financing and Preservation, HMF

Subject: Mandalay Shores Apartments
Project No. 067-00016
Clearwater, Florida

AUTHORIZATION FOR ALL CASH SALE
WITH SPECIAL PROVISIONS FOR REPAIRS
AND MAINTENANCE AS RENTAL HOUSING

Background

Mandalay Shores Apartments, built in 1963 and insured under Section 207 of the National Housing Act with an insured mortgage of $7,170,900, consists of 123 efficiencies, 181 one-bedroom, and 82 two-bedroom units. As is typical of southern Florida, a majority of the current tenants are elderly and/or retired.

HUD first acquired the project in April 1965, due to the inability of the owner to correct latent defects in the heating/cooling system and complete deferred maintenance. The project was subsequently sold with an insured mortgage of $6,755,330 in August 1970 to the Zenith Corporation, whose sole stockholder was Mr. Irving Edelman. After sales closing, Mr. Edelman instituted legal proceedings against the Department alleging improprieties due to defects in the sales offering. Mr. Edelman made no mortgage payments, lost his suit in court, and the project was reacquired by HUD in March 1977.

The Area Office in 1978-79 contracted with an A & E firm to provide a detailed analysis of the physical condition of the

project in preparation to complete needed repairs estimated at $4-$8 million. A 1979 OMB mandate on stopping repairs by HUD in favor of purchaser repairs changed these plans. The Area Office has recently gone back to the A & E firm to develop detailed plans and specifications for use by HUD or the purchaser to correct the physical condition. The Area Office is presently doing repairs of an emergency nature and has recently been instructed to replace the leaking roofs.

In 1979 the Area Office Property Disposition Committee made a preliminary determination to sell the project for condo conversion, as this was determined to be the project's highest and best use and the one which would give the Department its greatest monetary return. Subsequent to that determination, the nonprofit Mandalay Shores Cooperative Housing Association, Inc., was formed in August 1979 by several of the tenants with the intention of purchasing the project from HUD. The primary impetus for forming the Coop appears to have been misleading statements made at the project that it would be sold for conversion to a condominium and tenants would be given very short notice to purchase or vacate. The Coop managed to raise about $900,000 from about 280 of the then 340 tenants in a very short period. The Association delivered a proposal to purchase the project for its appraised value to the Area Office shortly thereafter which was reviewed as part of the Office's disposition analysis.

As required, the tenants received a notice on November 28, 1979, soliciting their comments on the sale of the project. Simultaneously, income certification was started to determine the extent of any need for Section 8. In addition, due to the poor physical condition of any property, the need for extensive rehabilitation and the advisability of having vacant units available for temporary relocation of tenants during the rehabilitation period, a policy was implemented that no further vacant units be rented.

Based on the above, in December 1979, the Area Manager met with the tenant body on-site and discussed the disposition of the project. The Area Manager took special efforts to calm fears of imminent eviction under any sales program. He discussed the various methods of sale available to the Department and HUD's decision making process. This meeting resulted in honest questions and comments from the tenants. A notice was sent to the tenants after the meeting repeating the information and

assurances provided by the Area Manager and asking for tenant comments. Based on the meeting and the notice, many comments were received. The comments were considered in the Area Office's analysis.

Area Office Analysis

Mandalay Shores is located directly on the Gulf of Mexico within close proximity to downtown Clearwater Beach, the City of Tampa, and enjoys easy access to needed services and employment opportunities. It is the only multifamily structure in a neighborhood of one and two story single family homes. Its 386 units are located in a central twelve story section within a ten-story connecting wing on each side. Other improvements include a 600 foot seawall, a concrete pier, and an olympic size heated swimming pool. All apartments have balconies. There are also five commercial areas and 339 parking spaces, 135 of which are covered.

The design, existing structural conditions and quality of construction are generally good, but the project suffers from latent defects and deterioration caused by a lack of proper maintenance and local weather conditions. Major repairs and replacement of the roof, plumbing, heating and air conditioning systems are necessary. The stucco exterior finish and balcony walls also need work. Many appliances must be replaced due to age and poor physical condition. Asbestos, applied to the ceilings during original construction to deaden sound, has been found to be present in amounts that, pursuant to EPA criteria and regulations, must be removed and/or properly contained.

The Area Office estimates 39 months to complete repairs, including resolution of the asbestos problem, at a total cost of $5.6 million. This cost does not include the A & E firms $3 million estimate for additional parking spaces which the Area Office has deemed unnecessary nor an estimated $2.6 million in fees and profit allowable under insured mortgage processing.

The Area Office's completed income survey determined that approximately 10 tenants are eligible for Section 8. The majority of the tenants in Mandalay and the surrounding area are white, elderly, middle and upper income families.

Mandalay Shores is located in Pinellas County, one of the

more densely populated areas in Florida. The local housing market is stabilizing after an over building period which occurred in the mid 1970's. The current occupancy rate in the Clearwater area is over 97%. Families and individuals both living in as well as moving into the area exhibit strong purchasing power. Due to the economy few rental housing starts have occurred in the last few years. Over 3300 rental housing units in the area have been converted to condominium ownership and the only new construction is single family or apartment condominiums. Due to the above, the rental housing stock in the overall market area has decreased, however, it is difficult to determine how many condominium units may actually be available as rental housing. The turnover rate at the project is historically very low. There are between 50-75 vacancies caused by the current non rental policy instituted to facilitate the pending rehabilitation of the project which will require "checkerboarding" to facilitate repairs.

The Area Office considered several methods of disposition for the project, ranging from maintaining the property as a rental, sale to the Association for cooperative conversion, as well as a condominium conversion. The Area Office has not raised rents in several years since the project is in need of substantial repairs, therefore the current rent roll is substantially below market comparables. Based on the current rent roll and expenses, the as repaired price as a rental based on 13 percent 40-year insured financing is estimated to be $8,694,000. Subtracting the repair and financing costs attributable to processing with a 221(d)(4) mortgage, leaves a negative value. Using more favorable financing such as 7-½ percent GNMA Tandem, the as-is price would be about $3,355,000.

Other methods of financing were considered including HUD advancing funds for the rehabilitation and taking back a 7-½ percent purchase money mortgage. While this developed an estimated as-is price of $7,000,000, HUD would spend over $5,300,000 for the repairs. This would also be a very costly method to finance the sale of a formerly unsubsidized project as HUD's borrowing rate is currently in excess of 7-½ percent.

The Area Office estimated that the price of the project as a condominium conversion would be about $9,000,000 all cash to HUD. This is based on a sellout price estimated at $20 million less rehabilitation, conversion and profit of $11 million. They

still state that this would be the highest and best use for the project.

The Area Office determined that, due to the shortage of rental housing in the area, the fact that the project is not formerly subsidized, and there are only a few tenants eligible for Section 8, there was no justification for a negotiated sale to the Association, and therefore rejected the Association's proposal.

Based on the analysis, the Area Manager has recommended that the project be repaired by the Department over a period of 3-4 years and then placed on the market for competitive sale. He further recommends that the sale include deed restrictions which would provide for the maintenance of the project as rental housing for at least one year from the sales closing, that HUD control rent increases during that period, and that HUD would, through a right of revertor, take back the project if the above restrictions are not complied with fully. In addition, he recommends that all bidders must have a demonstrated capability to finance not only the purchase of the project, but also its operation during the term it remains as a rental.

The Area Manager again met with the tenants in June 1980 to tell them of his recommendation and provided them a copy of the recommendation as required in 24 CFR 290. Many comments were received from tenants pleased with the recommendation to repair the building prior to sale. However, the Association wrote to the Area Manager expressing its strong disagreement with this approach and continues to demand a direct sale to it as a non-profit cooperative. In August 1980, they submitted another proposal to purchase the project which involved forming a limited partnership with the intention of maintaining the project as a low-to moderate-income elderly housing project through a negotiated sale. The Association also has filed suit to force such a sale.

Attachments

1. Jacksonville Area Manager's recommendation, dated June 27, 1980 with the disposition analysis and recommendation from the Area Office staff dated June 19, 1980.

2. Copies of written comments on the recommendation received from tenants and the Association.

3. Form HUD 9650 "Record of Acquired Multifamily Property".

4. Notice H 80-63(HUD)-Conversion of Existing Multifamily Projects to Condominium and Cooperative Ownership.

Recommendation

After carefully reviewing the Area Office's analysis and recommendation, the comments from the tenants and the Association, the Association's August 1980 proposal, Notice H80-83 on Condo/Coop conversions, and HUD regulations at 24 CFR 290, we do concur with the recommendation to provide for some type of action to prevent imminent displacement of these elderly tenants, but do not feel that there is sufficient justification for HUD to maintain this formerly unsubsidized project in inventory and undertake several million dollars worth of repairs without first attempting to competitively offer it to private entities which could make the repairs.

As for the Association's attempts to purchase the project, this project is not formerly subsidized and therefore the only manner in which a negotiated sale could be accomplished, pursuant to the 290 regulations, would be through a waiver of the advertising requirements of the regulations. In addition, because of the shortage of rental housing in the area, conversion of the project to other than rental use at this time is not advisable since it would remove units from the rental market, which would not be in accordance with current Departmental policy expressed in Notice H80-63. The policy in this Notice was not considered by the Area Office because it was not in effect at the time the analysis was being completed. Also, while the Association alleges that it has first right of refusal and HUD has to sell it the project pursuant to Section 246 of the Act, this is incorrect. Section 246 gives the Secretary authority to provide 100 percent financing in the purchase of a project being converted to cooperative ownership where the decision is made to sell in that manner. The provision is, therefore, permissive not mandatory. Given HUD's various disposition objectives, we find insufficient data to support a waiver to permit a negotiated sale to the Association.

In consideration of the advanced ages of the tenant body,

the current shortage of rental housing in the area, and in accordance with our objectives of minimizing displacement, special procedures must be provided in the disposition of the project to assure that the project is repaired, and that tenants are not forced to seek rental housing in a tight rental market in the near future. However, because of changing market conditions, we feel that rental housing use provisions should provide a reasonable period of assurance of rental housing.

Therefore, I request authority to offer Mandalay Shores Apartments for sale through a nationally advertised public offering at no stated minimum price, all-cash, no financing or mortgage insurance being provided by HUD, with authority to execute the contract from the highest acceptable bidder or reject all bids if none are acceptable. No minimum advertised price is being set due to the low rent structure, the current fluctuating financial market, the uncertainty as to actual cost for repairs, the potential for future use of the project, and the impact the following restrictions will have on market value and operating costs.

The advertising and sales documents, as well as the deed, would include the following provisions:

1. The purchaser must rehabilitate the project, and remove/or contain the asbestos, in a manner acceptable to HUD. The Area Office will provide detailed plans and specifications at the project site and the Area Office. The purchaser will be required to pay all temporary relocation costs during the rehabilitation.

2. During the rehabilitation and for a period of 20 years after completion of repairs to the entire project, the purchaser must maintain all units in the project available for rental and may not market them for any other purpose without the prior written approval of the Secretary. Approval may be granted only where the owner demonstrates a substantial change in circumstances from those considered in this authorization. The owner shall give tenants written notice 30 days in advance of any request to approve a change in use and provide the opportunity to present written comments.

3. All bidders must demonstrate capability of financing not only the purchase price, but also the rehabilitation

and operation during the rehabilitation period.

4. The purchaser will be required to provide a performance bond in the amount of $2,800,000 to assure completion of the rehabilitation.

5. The purchaser may not raise rents during the rehabilitation period covered by item 2. Thereafter, rents could be raised to market.

6. The purchaser must agree that, in the event the agreement with HUD is violated, title to the project will revert to HUD with the purchaser bearing all costs associated with that action and the operation of the project from the date of sales closing until HUD reacquired title.

We believe that the above method of sale best serves the needs of all parties concerned, i.e., tenantry the project, the neighborhood and the Department. It balances the Department's objectives by assuring that the project is sold, repaired, maintained as rental housing for a reasonable period, and returns the most satisfactory return to HUD's investment given the reasonable conditions outlined above. It differs from the Area Manager's recommendation basically in that repairs will be accomplished by the purchaser, not HUD, and the restriction for continued rental use covers a significantly longer period of time.

In the event no acceptable offers are received, we would reanalyze the case on the basis of the facts and in accordance with the policies and procedures then in effect.

Attachments

/s/
Member of Committee

/s/
Member of Committee

Robert P. Kalish
Director

/s/
Member of Committee

/s/
Member of Committee

CONCURRENCE: /s/
Deputy Assistant Secretary

APPROVED: _____
Chairman

9/30/80
Date

19-A

A-5

MEMORANDUM

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

Date: Aug 27 1981

To: Marc Harris, Chief
Analysis and Sales Branch

From: Bruce Weichmann,
Multifamily Participation Review Committee

Subject: FHA Case No.: 067-00016
Project Name: Mandalay Shores Apartments
Principals: Alfred Hoffman, Jr.

On August 25, 1981 the Multifamily Participation Review Committee reviewed the above project and voted to disapprove the principal. Attached is a copy of our letter to Mr. Hoffman informing him of the disapproval action.

/s/
Acting Participation Control
Officer

Attachment

HUD 96(4-80)

Received DHUD
Oct 25 1979
Jacksonville Area Office

PART VIII

DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

Office of Assistant Secretary for Housing—
Federal Housing Commissioner

Management and Disposition of HUD-Owned Multifamily Housing Projects

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Assistant Secretary for Housing—
Federal Housing Commissioner

24 CFR Part 290

[Docket No. R-79-707]

Management and Disposition of HUD-Owned Multifamily Housing Projects

Agency: Department of Housing and Urban Development (HUD).

Action: Amendment to interim rule.

Summary: This rule amends the present interim rule on the disposition program published January 27, 1977. The new interim rule represents significant changes in policy and procedure in the management and disposition of HUD-owned multifamily housing projects. The rule reflects HUD's commitment to maintain the stock of decent, safe and sanitary housing affordable by lower income tenants. The rule also reflects HUD's desire to administer the disposition program efficiently and to protect the financial integrity of the insurance funds.

Effective Date: October 30, 1979.

Comments Due: November 30, 1979.

Address: Comments should be sent to the Rules Docket Clerk, Office of the General Counsel, Room 5218, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

For Further Information Contact: Mr. Marvin Hilman, Office of Financing and Preservation, Room 6155, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410, (202) 755-7220. This is not a toll-free number.)

Supplementary Information: On January 27, 1977, the Department of Housing and Urban Development published an interim rule governing disposition of HUD-owned multifamily housing projects. Interested persons were given until February 28, 1977, to comment on the interim rule. A technical amendment to the interim rule concerning waivers. Section 290.11, was published October 28, 1977. No final rule has been published.

The Department received extensive comments on the interim rule. Those comments have helped shape changes in the administration of the property disposition program and have been considered in the drafting of the new interim rule. In addition, the Housing and Community Development Amendments of 1978, in Section 203, added statutory requirements governing the management and disposition of HUD-owned multifamily projects. Based on the above, significant changes have been made in the interim rule on which comments were solicited previously and further public comment is desired. Therefore, Part 290 is not being published as a final rule. However, it is effective November 8, 1979 as an amended interim rule because its

timely implementation will be beneficial to tenants of multifamily housing projects and to program administration. A final rule will be published after the comments on this interim rule have been received. A summary of comments received on the existing interim rule and responses to them is not included here because the rule is not a final rule and new comments are being solicited.

Three categories of projects are established for the disposition program. Formerly subsidized projects are all those acquired projects built or operated under subsidy programs designed to provide housing affordable by lower income tenants. Formerly unsubsidized projects presently serving as lower income housing resources are all those acquired projects not built or operated with a subsidy but which, by virtue of their tenancy or potential tenancy, are serving as housing for low and moderate income persons. These projects will be disposed of with a sufficient subsidy to prevent displacement of their lower income tenants and to assure the financial feasibility of such projects after sale. The third category is all other unsubsidized acquired projects and these projects will be sold with eligible tenants receiving a subsidy in the form of a Section 8 Certificate of Family Participation to avoid displacement.

Disposition processing will involve an initial notice of acquisition to tenants and government agencies, solicitation of comments, preparation of a disposition analysis and a disposition recommendation by the local Field Office Director.

General Provisions

This rule is intended to apply to all multifamily housing projects in the Department's Inventory as soon as it becomes effective. While this should not prove burdensome, because the rule reflects current administrative policy, § 290.3 specifically provides that no existing management contracts are required to be re-let or pending solicitations required to be readvertised to conform to the rule. Property disposition recommendations already submitted to the Property Disposition Committee will be processed under previous instructions. Eligible tenants, those who will receive the benefit of subsidized disposition, are defined as those who qualify for Section 8 assistance because that is the subsidy which is intended to be used in the disposition of the Department's inventory. Other tenants will not receive the same benefits and protections as eligible tenants.

Management Provisions

The new management section addresses overall objectives, project management, occupancy issues, and rents. The management objectives support the Department's policies of serving lower income tenants, maintaining the housing stock, avoiding unnecessary displacement and encouraging tenant involvement in disposition decisions. To assure project management capable of meeting the Department's concerns, detailed standards for selecting competent qualified management are mandated. Only those management entities fully capable of providing successful project operation whose bids reflect services required for successful operation can be awarded management contracts.

Rents are set so that eligible tenants in formerly subsidized projects will pay only what they would be paying under the Section 8 program. All other rents are tied to the lower of the standard FHA determination of gross potential rent or market rates but flexibility in adjusting rents is provided so that financial hardship and undesirable turnover can be avoided.

Disposition Provisions

The disposition sections address the policies and procedures for determining when projects will be sold with a subsidy and how projects are to be processed for disposition. The criteria for demolishing projects reflects the Department's view that demolition should be a last resort in disposition but may still be proper. A detailed analysis of the consequences of demolition is required whenever such a recommendation is made.

Every disposition will require approval of a Final Disposition Program by the appropriate Property Disposition Committee based on the Field Office Director's recommendation and a supporting disposition analysis. A method of disposition will also be approved which will either be by traditional competitive bid, solicitation of purchase proposals followed by bids, or, in certain cases involving formerly subsidized projects, by negotiation. (A purchase proposal is a plan to purchase and operate a project presented without regard to price or where the price is fixed in advance by the Department.) Every purchaser must meet basic requirements set by the Department for each particular sale and only bidders who meet these requirements will be selected. In addition, in selecting purchasers of formerly sub-

sidized projects, the Department must consider criteria related to the owner's capacity to operate the project successfully for lower income tenants.

In any sale, the Department may require that repairs be made to the project as a condition of sale and that the repairs be completed in a timely manner. The Department will enforce this condition by retaining the right to rescind the sale for noncompliance.

In cases where eligible tenants are displaced by disposition of a project, they will be eligible for displacement benefits including assistance in locating replacement housing, priority for other Federal housing assistance and payment of reasonable moving costs. Eligible tenants displaced by repairs undertaken by the Department will also receive assistance, including the right to return to a unit in the same project and payment of moving costs out of and back into a unit. Tenants who are not eligible for Section 8 assistance will not be eligible to receive displacement benefits.

Interested persons are invited to submit written comments, suggestions and data regarding the amendment to the interim rule to the Rules Docket Clerk, Office of the General Counsel, Room 5218, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410. All communications should make reference to the above docket number and title. Submissions received on or before 30 days after publication will be considered before adoption of a final rule. A copy of each submission will be available for public inspection during business hours at the above address.

A finding of inapplicability with respect to environmental impact has been prepared in accordance with Procedures for Protection and Enhancement of Environmental Quality. Copies of the findings are available for inspection and copying in the Office of the Rules Docket Clerk.

Accordingly, the Department amends Chapter II, 24 CFR 290, to read as follows:

PART 290—MANAGEMENT AND DISPOSITION OF HUD-OWNED MULTIFAMILY HOUSING PROJECTS

Sec.

Subpart A—General Provisions
290.1 Purpose and scope
290.3 Applicability
290.5 Definitions
290.7 Waivers

Subpart B—Management Provisions
290.10 Management objectives
290.13 Project management
290.15 Occupancy
290.17 Rental rates

Subpart C—Disposition Provisions
290.20 Disposition objectives
290.23 Initial determination
290.25 Determination of need for low and moderate income housing
290.27 General determination of subsidy to be provided
290.30 Disposition of vacant land
290.33 Initial notice
290.35 Disposition analysis
290.37 Director's disposition recommendation
290.40 Notice of disposition recommendation
290.41 Forwarding of disposition recommendation
290.43 Demolition
290.45 Notice of displacement
290.47 Displacement benefits
290.50 Disposition program
290.53 Methods of disposition
290.55 Property disposition committee

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Subpart A—General Provisions

§ 290.1 Purpose and scope.

The purpose of this Part is to prescribed the basic policies which govern the management and disposition of HUD-owned multifamily housing projects by the Department of Housing and Urban Development. The intent of these regulations is to provide a disposition program which involves all interested parties and properly balances the interests of the tenants, the neighborhood, the local government, the FHA insurance funds, and furthers the policies of the National Housing Act.

§ 290.3 Applicability.

These regulations shall apply to the disposition and management of all HUD-owned multifamily housing projects, both those presently owned and those acquired in the future, except that (a) no existing management contracts or solicitations for management contracts past the point of advertisement shall be required to be reopened in order to bring them into compliance with these regulations; (b) property disposition recommendations already submitted to the Property Disposition Committee shall be processed under applicable instructions in effect at the time of submission; and (c) the time period for sending initial notices pursuant to § 290.33 for projects which are owned by HUD as of the effective date of these regulations shall commence 30 days after that effective date.

§ 290.5 Definitions.

(a) *Director*—The HUD field orfice Director, who is either an Area Office Manager in a HUD Area Office, or a Supervisor in a HUD Service Office who is delegated authority to process the disposition of multifamily projects.

(b) *Disposition*—The sale or conveyance by HUD of a HUD-owned multifamily housing project, or any part of a project, including the demolition of structures.

(c) *Disposition analysis*—The data and analysis prepared by the Director or his or her staff as a basis for making a disposition recommendation.

(d) *Disposition recommendation*—The Director's recommended disposition program for a project, including supporting information and the disposition analysis.

(e) *Eligible tenant*—A person or family legally occupying a rental unit in a HUD-owned multifamily housing project who qualifies for housing assistance payments pursuant to section 8 of the U.S. Housing Act of 1937, as amended.

(f) *Final disposition program*—The disposition program authorized by the appropriate Property Disposition Committee.

(g) *Formerly subsidized project*—A multifamily housing project in which the tenants received the benefits of any of the

following subsidy programs immediately prior to HUD's acquisition of title to the project:

(1) Below market interest rate mortgages insured under section 221(d)(3) of the National Housing Act; or

(2) Interest reduction payments made in connection with mortgages insured under section 236 of the National Housing Act; or

(3) Rent supplement payments under section 101 of the Housing and Urban Development Act of 1965; or

(4) Direct loans at below market interest rates, pursuant to section 202 of the Housing Act of 1959, sections 401 and 404(b)(3) of the Housing Act of 1950, or section 312 of the Housing Act of 1964; or

(5) Housing assistance payments pursuant to section 23 of the United States Housing Act of 1937 in effect prior to January 1, 1975, or section 8 of the United States Housing act of 1937, except section 8 existing housing payments.

(h) *Formerly unsubsidized project*—A multifamily housing project which was not subsidized prior to HUD's acquisition under any of the programs listed in the definition of formerly subsidized project in paragraph (g) above.

(i) *HUD*—The Department of Housing and Urban Development.

(j) *Multifamily housing project(s) or Project(s)*—Any property, or combination of properties, consisting of 5 or more living units, acquired by the Secretary as the result of a default under a regulatory agreement or under a mortgage insured or held by the Secretary pursuant to the National Housing Act or under a program involving a loan guarantee or a direct loan by the Secretary.

(k) *Nonprofit consumer cooperative corporation*—A legally chartered organization entirely owned by its voting membership which exists primarily to furnish goods and services to benefit its membership and which is not organized for the purposes of making profit or gain as determined by HUD.

(l) *Property Disposition Committee*—The designated group of HUD officials to whom is delegated the authority to approve final disposition programs for multifamily housing projects.

(m) *Secretary*—The Secretary of HUD or his or her designee.

(n) *Section 8*—An assistance program which provides housing assistance payments pursuant to section 8 of the U.S. Housing Act of 1937, as amended.

(o) *Subsidy*—An assistance program which provides housing assistance payments pursuant to section 8 or any other housing assistance program of the U.S. Housing Act of 1937, as amended, or any successor program.

(p) *Tenant*—A lawful occupant of a multifamily housing project.

(q) *Vacant land*—property on which there are no structural improvements present.

§ 290.7 Waivers.

Upon completion of a determination and finding of good cause by the Assistant Secretary for Housing—Federal Housing Commissioner or his or her designee. HUD may waive any provision of this Part in any particular case subject only to statutory limitations. Each waiver shall be in writing supported by documentation of the facts and reasons which formed the basis for the waiver.

Subpart B—Management Provisions

§ 290.10 Management objectives.

The management of HUD-owned multifamily housing projects shall be carried out in accordance with the objectives listed below:

(a) To provide a level of services necessary to maintain occupied housing in decent, safe and sanitary condition in the most cost efficient manner;

(b) To keep the present tenants in place to the greatest extent possible consistent with sound management practices;

(c) To maintain all vacant buildings and land in a way that eliminates health and safety hazards to the public and assures the proper security of the project;

(d) To provide and to occupy fully as many decent, safe, and sanitary dwelling units as possible, consistent with the need for the type and size of the units;

(e) To facilitate tenant involvement in decisions about the future disposition of the project.

§ 290.13 Project management.

Good management of HUD-owned projects is essential to the success of the multifamily housing preservation effort. Therefore, stringent qualification standards must be used in procuring management services for all projects.

(a) In contracting for services to manage its multifamily housing projects, HUD shall find a management proposal to be acceptable only if it meets the level and quality of services required under the qualification standards stated below.

(1) Satisfactory performance with respect to: (i) managing properties similar in type and complexity; (ii) handling tenant and tenant group concerns; (iii) property upgrading, maintenance and preservation; (iv) maintaining expected levels of occupancy and rental collections; (v) tenant selection; (vi) effectiveness in developing and enforcing project policies; (vii) exercising sound business and administrative judgment; (viii) financial stability and responsibility; (ix) compliance with State and local property management licensing requirements; and (x) any other management qualification specified by HUD which may be important to successful management of a specific project.

(2) Efficiency in providing management and services which adequately meet all project operating needs.

(3) The proposed management plan must meet HUD's prescribed requirements and address fully the needs of the

residents and of the project and shall include a proposed management budget which addresses the qualify and quantity of services required by the residents and the project;

(4) Any other criteria HUD determines are relevant to a specific project;

(b) Where it is infeasible or impracticable to secure adequate management for formerly subsidized projects through conventional bidding procedures, HUD may negotiate with qualified management where (1) such management meets all the criteria necessary for successful operation of the project, and (2) satisfactory terms, including reasonable cost of services, can be achieved through such negotiation.

(c) Project managers shall be required to manage projects in accordance with HUD's management objectives contained in § 290.10 and any other directives HUD may issue.

§ 290.15 Occupancy.

(a) Priorities. Occupancy in HUD-owned projects shall be available to persons or families who meet HUD's written tenancy standards made pursuant to paragraph (b) of this Section, on a first-come, first-served basis, except that a priority will be given to eligible tenants displaced from other HUD/owned projects after receiving a Notice of Displacement. (See § 290.45)

(b) Standards, HUD shall establish written standards for selecting qualified tenants based on the management objectives in § 290.10 and prudent management policies. The standards for formerly subsidized projects shall include an income eligibility criteria to assure that the lower income character of the projects is maintained.

(c) Evictions. Evictions from HUD-owned properties shall be governed by the regulations at 24 CFR 450, Subpart B.

(d) Dangerous conditions. Whenever HUD determines that there is an immediate threat to the health and safety of the tenants because of the condition of the project and emergency repairs cannot alleviate the problem with the tenants in occupancy, HUD may require the tenants to vacate the premises in accordance with paragraph (c) of this Section. When this happens, HUD shall provide displacement benefits to displaced

tenants as provided in § 290.47. Tenants displaced under this paragraph shall have a right to return to repaired units in the project from which they were displaced.

§ 290.17 Rental rates.

(a) Development of rental rates. Within 30 days after the Secretary's acquisition of title to a project, the Director shall develop a market rental rate for each unit in the project. In addition, a rent schedule based on the FHA determination of gross potential rent, including the full debt service payments required under the previous mortgage note, will be developed. The approved rent schedule will be the lower of these two. Rents shall be reviewed and updated at least annually.

(b) Rents to be charged. All tenants in formerly subsidized projects shall be charged the lesser of 25 percent of income as determined pursuant to section 8 of the U.S. Housing Act of 1937, as amended, or the rent established for the unit in (a) above; provided that families who qualify to pay a lesser percentage of income pursuant to section 8 shall not be required to pay more than that percentage. All tenants in formerly unsubsidized projects shall be charged the rent as determined pursuant to paragraph (a) above, provided that HUD may set lower rents for these tenants where that action, if determined by the Director, is necessary or desirable to maintain the existing economic mix in the project or to prevent undesirable turnover.

(c) Utility allowance. The rent payable in formerly subsidized projects shall be reduced by an amount equal to the reasonable cost of utilities for the unit, or a per unit or per square foot basis, where utilities are paid directly by the tenant.

(d) Rent changes. Whenever a change in rents is proposed, HUD shall provide tenants 30 days notice of the proposed changes and an opportunity to review and comment on the new rents and supporting documentation. An additional 30 days notice shall be provided before the new rents become effective.

(e) Certification of income. Tenants may be required to provide appropriate information concerning income for the purpose of income certification in a manner prescribed by HUD so that HUD can establish rents and an appropriate disposition program.

(f) Where a tenant does not certify income in accordance with this subpart, the tenant shall pay the unit rent as determined pursuant to paragraph (a) above.

Subpart C—Disposition Provisions

§ 290.20 Disposition objectives.

The disposition of HUD-owned multifamily housing projects shall be carried out in accordance with the objectives listed below.

(a) Reduce the inventory of HUD-owned projects in a timely manner consistent with the goals of:

(1) Preserving or increasing the number of housing units available to and affordable by lower income tenants;

(2) Maintaining the existing housing stock in decent, safe and sanitary condition; and

(3) Preserving and revitalizing urban residential neighborhoods.

(b) Consistent with meeting the above goals, to obtain a sale price based on the project's present market value and anticipated future use or condition sufficient to protect the financial interests of the government and to produce a satisfactory return to the mortgage insurance funds.

(c) To dispose of projects in a manner which is consistent with HUD approved housing and community development needs, plans and actions of local governments to the extent feasible.

(d) To dispose of all projects in a manner which minimizes the displacement of tenants.

(e) To demolish projects only as a last resort.

(f) These are national objectives and, while local circumstances may make it impossible to meet all the objectives, they should be met to the greatest extent feasible. In some cases the objectives may represent conflicting public policy goals and

decisions will have to be made to balance and choose among various objectives. In these cases discretion and judgment will have to be exercised in designing a program which best meets the national goals of providing affordable housing and preserving and revitalizing neighborhoods.

§ 290.23 Initial determination.

(a) Within 45 days after HUD acquires title to a project, the Director shall make an initial determination as to whether or not the project will be recommended for sale with subsidy.

(b) If the project is formerly subsidized, the initial determination will be to recommend sale with subsidy attached to the units.

(c) If the project is formerly unsubsidized, the initial determination will be to recommend sale either:

(1) without subsidy, or

(2) with subsidy for any eligible tenant.

§ 290.25 Determination of need for low and moderate income housing.

(a) There is a need for low and moderate income housing in the market area served by the project which is under review unless the Director finds: (1) there is sufficient decent, safe and sanitary housing available in the market area at rents the present eligible tenants can afford without exceeding 25 percent of income, and (2) such housing is not needed for other persons residing in or expected to reside in the community.

(b) Formerly subsidized projects and formerly unsubsidized projects serving as a lower income housing resource, as determined pursuant to § 290.27(c), may not be sold without a subsidy if there is a need for low and moderate income housing in the community.

§ 290.27 General determination of subsidy to be provided.

(a) A formerly subsidized project shall be allocated subsidy for the longest possible term of the subsidy contract, pursuant to 24 CFR 886, Subparts B or C.

(b) A formerly subsidized project shall be allocated subsidy pursuant to 24 CFR 886, Subparts B or C, sufficient to assist 100% of the units. Provided, however, that the Director may recommend disposition for less than 100% of the units if the Director makes a written finding that such a sale will promote a racially mixed or mixed income tenancy and the amount of subsidy provided is at least sufficient to assist all eligible tenants residing in the project.

(c) A formerly unsubsidized project shall be allocated subsidy under the following conditions:

(1) In a project which has become a lower income housing resource, evidenced either by the income levels of the present tenancy generally being at or below the eligibility criteria for subsidy, or its inability to attract higher income tenants to fill vacancies, subsidy pursuant to 24 CFR 886, Subparts B or C, shall be allocated to a sufficient number of units to prevent displacement of eligible tenants and to assure the financial feasibility of the project after sale.

(2) In a project which does not meet the criteria of (c)(1) above, subsidy in the form of Certificates of Family Participation pursuant to 24 CFR 882 shall be provided to any eligible tenant to permit him or her to remain in the unit in order to prevent displacement. Limitations on subsidy rent levels will be waived on a case-by-case basis when necessary to permit an eligible tenant to remain in the project. Tenants may use the subsidy as permitted under the Section 8 Existing Housing program requirements to move to other housing.

(3) The Director may recommend the sale of a formerly unsubsidized project with subsidy (i) to promote a mixed income tenancy or a racially mixed tenancy outside of central cities or (ii) to preserve that housing stock for occupancy by lower income tenants.

§ 290.30 Disposition of vacant land.

The following procedure will be followed in disposing of all vacant land:

(a) After acquiring title to vacant land, the Director shall complete an appraisal of the fair market value of the land.

(b) After the appraisal is completed, the Director shall send a notice to Federal, State and local government agencies, including housing and renewal agencies, which may have an interest in acquiring the land. The notice shall include information on the availability of the land for purchase and request a written reply within 30 days as to whether or not the agency has any interest in acquiring the land.

(c) If none of the Federal, State or local government agencies notified above express interest in acquiring the vacant land, the Director shall advertise the land for sale by competive bid.

§ 290.33 Initial notice and solicitation of comments.

(a) Within 60 days after HUD acquires title to a project, the Director shall issue the following notices:

(1) A notice to each tenant in the project served in accordance with § 290.33(c) which shall include:

(i) A statement that HUD has acquired title to the project, that HUD intends to sell it, and, where applicable, that it may be sold with Section 8 assistance for all eligible tenants;

(ii) An explanation of the disposition process, including a statement that tenants will receive notice of the Director's recommendation, will have access to it and will have an opportunity to submit comments to be reviewed by the Director;

(iii) Where applicable, a statement that sale of the project with Section 8 assistance will not affect the right of any tenant to continue in occupancy;

(iv) An invitation to submit proposals, comments and facts to the Director within a certain time period, not less than 30 days, to be considered by the Director in making a disposition recommendation, particularly expressions of interest in converting the project to a cooperative or other form of resident controlled ownership; and

(v) An explanation of the displacement benefits which will be available if eligible tenants are displaced by the disposition of the project.

(2) A notice to Federal, State and local government agencies, including housing and renewal agencies, which may have an interest in acquiring the project. The notice shall include information on the availability of the project for purchase and request a written reply within 30 days as to whether or not the agency has any interest in acquiring the project.

(b) All comments received from tenants, agencies and the public shall be reviewed by the Director and taken into consideration in the disposition recommendation.

(c) All notices to project tenants shall be either personally delivered or sent by first class mail. In addition, general notices to all tenants shall be posted in the project office and in appropriate conspicuous locations around the project.

§ 290.35 Preparation of disposition analysis.

(a) As soon as possible after the notice in § 290.33 has been sent, the director shall prepare a disposition analysis to serve as the basis for the Director's disposition recommendation.

(b) The disposition analysis shall include:

(1) A financial analysis of the project, including an analysis of operating expenses and an appraisal of the fair market value of the property.

(2) A physical analysis of the project, including the condition of the structure and the grounds, the need for rehabilitation or repairs and the estimated costs of such work.

(3) An analysis of the probable causes of failure of the project and the type of management and ownership expertise which may be needed to operate the project successfully.

(4) An analysis of the feasibility of conversion to resident controlled ownership including cooperative ownership. This analysis should include consideration of the financial feasibility of conversion including the ability of the present tenants to afford it, the interest and support among the present tenants for conversion, and the impact of conversion on neighborhood preservation and revitalization.

(5) A summary of comments received from the tenants, the public, the local Public Housing Agency and any other governmental agencies regarding the disposition of the project.

(6) An assessment in accordance with HUD requirements implementing the National Environmental Policy Act of 1969, as amended, the National Historic Preservation Act (Pub. L. 89-665), the Archeological and Historic Preservation Act of 1974 (Pub. L. 93-291), and Executive Order 11593 on Protection and Enhancement of the Cultural Environment, including the procedures prescribed by the Advisory Council on Historic Preservation in 36 CFR 800, and such other statutes that may have an impact on the disposition of the project.

(7) As it affects disposition considerations for the project, an analysis of local housing needs and conditions and actions being taken to address these needs.

(8) Information on site suitability and accessibility to needed services and employment.

(9) Appropriate demographic data on income ranges and distribution of the minority population by census tract, neighborhood, jurisdiction and SMSA in which the project is located, the Section 8 Fair Market Rents for the area, the income levels of present tenants, and consideration of the impact of disposition on the racial composition of the neighborhood as well as the neighborhoods into which tenants might move after displacement.

(10) An analysis of the need for and the feasibility of combining units to create units suitable for large families.

§ 290.37 Director's disposition recommendation.

The Director shall review the disposition analysis and any other relevant information and make a disposition recommendation for the project which is consistent with the objectives set out in § 290.20.

(a) On the basis of the disposition analysis, tenant and other comments and any other relevant information, the Director shall make written recommendations on the following issues:

(1) The proposed disposition program;

(2) The appropriateness of conversion to resident controlled ownership;

(3) The appropriateness of creating units suitable for large families;

(4) The type of management and ownership expertise required to operate the project successfully in light of the causes of its failure;

(5) The proposed method of financing the recommended disposition program, including the financing of any repairs necessary to the successful operation of the project;

(b) Every disposition recommendation must include a determination of the number of tenants who will be displaced as a result of the recommended disposition and a description of the relocation assistance to be provided, including a description of how such assistance will be provided.

§ 290.40 Notice of disposition recommendation.

(a) No later than 15 days before the Director submits the disposition recommendation to the Property Disposition Committee, the Director shall deliver a notice in accordance with § 290.33(c) to tenants in the project.

(b) The notice shall state briefly the Director's proposed disposition recommendation summarizing the major facts supporting the recommendation and shall include:

(1) An invitation for written comments to be sent to the Director for 15 days from the date of the notice;

(2) A statement that the full disposition recommendation and analysis and other supporting information will be available for inspection and copying at the HUD field office and for inspection at the project office;

(3) A statement that the Property Disposition Committee will be reviewing the Director's recommendation and any comments submitted and will then make a decision to accept, modify or return the Director's recommendation;

(4) A statement that no action on disposition will take place until the Committee approves a final disposition program;

(5) A statement of the eligibility requirements for displacement benefits for any tenants who might be displaced and a summary of the expenses which are reimbursable, the assistance which HUD will provide in seeking replacement housing, and the names, addresses and phone numbers of HUD-approved counseling agencies; and

(c) A separate notice of anticipated displacement shall be sent to each tenant who would be displaced if the Disposition Recommendation were approved as submitted.

(d) Reasonable requests from tenants for a waiver of the fees charged for copying under the provisions of 24 CFR 15.14 will be honored.

§ 290.41 Forwarding of disposition recommendation.

After the comment period, described above in § 290.40, the Director shall forward the disposition recommendation to the appropriate Property Disposition Committee with tenant comments, a summary of those comments and any additional information the Director considers relevant to the disposition recommendation.

§ 290.43 Demolition.

HUD may permit the demolition of units or projects as part of the disposition or management of a project, put demolition shall be recommended only as a last resort.

(a) In making a disposition recommendation, the Director may recommend a plan to demolish a project or part of a project on the basis of one or more of the following criteria:

(1) The current and projected need for the housing is not sufficient to obtain the level of occupancy required for feasible project operation.

(2) There is major structural damage or serious physical deterioration and it is not feasible to repair the project because of engineering or design problems or because of excessive cost.

Repairs which cost more than 85% of replacement cost ordinarily will not be considered financially feasible.

(3) Conditions in the neighborhood surrounding the project adversely affect the quality of the project environment to the point where life, health or safety of project residents is threatened. Inaccessibility to facilities or services will not be a decisive factor, unless it can be demonstrated that such inaccessibility was the principal cause of the failure of the project.

(b) In every case, demolition may not proceed until suitable displacement arrangements pursuant to § 290.47 have been made.

(c) Whevever demolition is recommended as part of disposition, the disposition recommendation must include a specific analysis of:

(1) The extent to which the current use and the projected use of the land after demolition are consistent with local, regional and state land use and housing plans;

(2) Where there is a need in the community for low income housing as defined pursuant to § 290.25, what is being done to replace the units which are to be demolished;

(3) The probable short-term and long-term impacts of demolition on the neighborhood and the community;

(4) The availability of suitable replacement housing for the present tenants; and

(5) The estimated cost of displacement benefits as outlined in § 290.47, excluding the cost of subsidy programs for which the tenants may be eligible.

(d) Whenever demolition is recommended during HUD's ownership of the project, the Director shall prepare written documentation pursuant to paragraph (c) above of the facts and reasons which formed the basis for the decision to recommend demolition. The recommendation and supporting documentation shall be forwarded to the appropriate Property Disposition Committee for approval.

(e) Every demolition recommendation shall include the findings of an Environmental Assessment, and an Environmental Impact Statement (EIS) where the Environmental Assessment concludes that an EIS is necessary.

§ 290.45 Notice of displacement.

(a) Within 30 days after the final disposition program is approved under § 290.50, HUD (or a Public Housing Authority, where it is acquiring the project) shall provide each eligible tenant who will be displaced with a notice of displacement.

(b) Where HUD determines that the final disposition program will displace an eligible tenant because the project is being demolished or converted to other than residential use, that eligible tenant shall receive a notice advising the tenant that if he or she moves from the project between the effective date of the notice and a later date set by HUD (not sooner than 30 days before the anticipated date of sale or conveyance) the tenant will be entitled to displacement benefits as outlined in § 290.47. The notice should describe the reimbusement process and provide the name, address and phone number of the HUD official(s) who will provide assistance in locating replacement housing.

§ 290.47 Displacement benefits.

(a) Tenants who are not eligible tenants pursuant to this part will not receive displacement benefits unless otherwise provided by law. Where disposition is to a state agency which will acquire a project with Federal financial assistance, as defined in 24 CFR 42.20, displacement benefits will be provided in accordance with the provisions of 24 CFR 42.

(b) Whenever eligible tenants are displaced as a result of the disposition or repair of a project, they shall be entitled to the benefits set forth in this section. Where appropriate, these benefits may be offered by HUD in the alternative. Eligible tenants who move prior to approval of the final disposition program shall be eligible for displacement benefits if they receive a notice of anticipated displacement pursuant to § 290.40(c) and they would have been displaced by the disposition program as approved. Eligible tenants shall:

(1) Receive priority to occupy units in HUD-owned former-

ly subsidized projects at rental rates not to exceed 25 percent of income. Where more than one suitable unit is available for occupancy, the Director may select the unit to be offered to the tenant;

(2) Be afforded the opportunity to return to repaired units in the same project whenever possible and be reimbursed for moving expenses pursuant to paragraph (b); or

(3) Receive a priority for other Federal housing assistance under the United States Housing Act of 1937, as amended.

(c) Eligible tenants shall be given assistance in locating replacement housing and shall be reimbursed for moving expenses not to exceed an amount determined by HUD to be reasonable for the household size and circumstances of the move.

(d) If an eligible tenant declines the assistance offered pursuant to paragraph (b) of this Section, such tenant shall still be eligible to receive assistance afforded under paragraph (c), and the provision of such assistance shall discharge HUD's obligation to provide displacement benefits pursuant to this Part.

§ 290.50 Disposition program.

(a) The Property Disposition Committee will review the Director's recommendation, the disposition analysis and any other information submitted by the Director as well as all other comments received and any other information it may require, all of which shall become part of the administrative record. After its review the Committee may approve the recommendation as submitted, modify it and return it approved as modified, or return it for further work and resubmission.

(b) If the Committee approves the recommendation as submitted or as modified, it shall become the final disposition program and the notice procedure in § 290.45 shall be implemented by the Director upon written notification of the Committee action.

(c) No final disposition program which provides for repairs to be performed by the purchaser or other conditions of sale may be approved unless it provides for rescission of the sale or reconveyance of the project to HUD if the repairs, which are a

requirement of the sale, are not carried out in a timely manner, or if the project is not operated in accordance with any other conditions of the sale. This remedy is in addition to any escrow of repair funds which may be required as a condition of sale or any other remedy available to HUD.

§ 290.53 Methods of disposition.

Disposition shall be through a publicly advertised competitive offering or a negotiated sale.

(a) Competitive offerings shall be by purchase proposals or by competitive bid, as recommended by the Director.

(1) A purchase proposal is a solicited submission of a plan to purchase and operate a project either without reference to price or where the price of a project is fixed by HUD in advance.

(2) When the competitive offering is by purchase proposals HUD shall review the proposals considering, among other factors which the Director deems appropriate; the acceptability of the management and ownership plan; the probability of adequate performance under the proposal; and the feasibility of the proposal in relation to the particular needs of the project and the tenants.

(3) HUD shall notify each person and entity submitting an acceptable proposal that its proposal is acceptable and request submission of an executed Contract of Sale and Purchase to HUD at a specific time and place. That Contract shall include a proposed purchase price for the project and any other information requested by HUD. HUD shall then proceed to evaluate and award the contract in the same manner as for competitive offerings by bid, provided that in the case of a clearly superior proposal such proposal may be selected if the Director makes a written determination supporting such selection.

(4) All other competitive offerings shall be by competitive bid.

(b) In selecting qualified purchasers for formerly subsidized projects by competitive bid, purchase proposal or negotiation, HUD shall establish requirements and criteria which HUD must consider in determining whether or not a proposed purchaser is qualified to own and operate the project in a manner acceptable

to HUD. HUD may establish review panels to select qualified purchasers. Regardless of which disposition method is used, in selecting a purchaser HUD shall be satisfied that sufficient levels of competency have been met with respect to:

(1) ability to provide sound financial management;

(2) ability to provide sound physical management;

(3) ability to respond to the economic and social needs of the tenants and to work with resident organizations;

(4) responsiveness of the proposed ownership plan to the needs of the tenants and the project;

(5) adequancy of the purchaser's organizational, staff and financial resources to implement the proposed ownership approach;

(6) ability to satisfy all the conditions of the disposition;

(7) any other criteria HUD determines are relevant if advance notice of such criteria is given to prospective purchasers.

(c) Negotiated Sales. (1) HUD may negotiate the sale of any project to an agency of the Federal, State or local government.

(2) HUD may negotiate the sale of a formerly subsidized multifamily housing project when HUD determines that such a sale would beat meet the objectives of this Part. Such negotiated sales may be recommended when:

(i) The purchaser is a nonprofit cooperative corporation formed by the present or prospective tenants for the purpose of holding title to the project;

(ii) The purchaser is a nonprofit or limited dividend entity and it is determined by HUD to be the best source of ownership in the locality capable of the successful long-term operation of the project in a way which is responsive to all the HUD requirements for operation of the project;

(iii) The project is to be converted to homeownership and individual condominium or homeownership units are to be sold; or

(iv) The purchaser is a nonprofit consumer cooperative corporation with successful experience in the operation of nonprofit housing.

(3) When an offer to purchase is received as part of a negotiated sale, it shall be evaluated to assure that it complies with all HUD requirements for the sale of the project. Particular attention shall be paid to the financial feasibility of the proposed ownership plan.

(4) When a sale is negotiated to a nonprofit cooperative corporation or a nonprofit consumer cooperative corporation, the sales price shall be computed by determining the value of the project in one of the following ways:

(i) if the project is sold to lower income tenants without a subsidy, the value shall be the amount which can be supported by debt service payments equal to the rental income to the project operated as a nonprofit cooperative with the tenants paying 25% of income for rent or the market rental rate, whichever is lower, minus payments for all operating expenses, taxes and required reserves;

(ii) if the project is sold with Section 8 subsidies the value shall be determined as in (i) except that the project rents set pursuant to Section 8 shall be used to determine rental income. Where appropriate (as in a partially subsidized project), a combination of the above methods may be used to determine price;

(iii) in all other cases, the value shall be the fair market value as determined by HUD.

(iv) The prepaid expenses incurred in converting to cooperative ownership may be recovered by deferring payment on the mortgage and placing project rents into an escrow for the purpose of paying those expenses or HUD may make such other provision for payment as HUD determines are reasonable and appropriate.

(d) Previous Participation Review. All purchasers of HUD-owned projects must be approved under the Previous Participation Review and Clearance procedures in 24 CFR 200.210 *et seq.*, except Federal, State or local government agencies. √

§ 290.55 Property disposition committee.

(a) There shall be a Property Disposition Committee (PDC) with authority to approve all dispositions of HUD-owned multifamily housing projects.

(b) The PDC shall consist of the following officials or their designees:

(1) The Chairperson shall be the Assistant Secretary for Housing-Federal Housing Commissioner.

(2) The Deputy Assistant Secretary for Multifamily Housing Programs.

(3) The Director of the Office of Multifamily Housing Management and Occupancy.

(4) The Director of the Office of Multifamily Housing Development.

(5) The General Counsel.

(6) The Deputy Assistant Secretary for Public Housing and Indian Programs.

(c) The PDC may delegate its authority to approve property dispositions to PDC's convened at the Regional or Area Office level on such terms and conditions as the PDC may prescribe.

(d) The Director of the Office of Multifamily Financing and Preservation shall serve as a non-voting member of the Property Disposition Committee and shall be responsible for presenting disposition recommendations to the Committee for its decision.

Issued at: Washington, D.C., August 28, 1979.

Lawrence B. Simons,
Assistant Secretary for Housing-Federal Housing Commission.

[FR Doc. 79-30306 Filed 9-28-79; 8:45 am]

Billing Code 4210-01-M

A-7

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C. 20410

Office of the Assistant Secretary for
Housing-Federal Housing Commissioner

Oct 23 1979

Memorandum For: Everett Rothschild
Area Manager
HUD Area Office
Jacksonville, Florida 4.68

Subject: Mandalay Shores
Project No. 067-00016
Clearwater, Florida

This is in response to your memorandum of August 28, 1979, and our subsequent conversations with you and tenants concerning the disposition of Mandalay Shores including possible sale to the tenants for conversion to homeownership.

As you are aware, HUD regulations at 24 CFR 290, Disposition of HUD-Owned Multifamily Projects, require that we consider cooperative or condominium conversion in each disposition analysis.

In order to comply with these regulations, you should make an analysis of the basic feasibility of such a conversion for Mandalay and you should provide a reasonable opportunity for a bona fide tenants' organization to present a proposal. In this regard, you should assure yourself that there is a legitimate tenant organization and determine the number of tenants who are being represented. Upon request, such an organization should be provided with project operating expense information and the architectural and engineering report. They should also be informed that HUD will not entertain a proposal which contemplates sale of the project for less than its "as-is" appraised value and that the Department will not provide financing in the sale; however, it will consider the feasibility of using a HUD mortgage insurance program. If you are unable to establish a supportable, as-is value through the traditional appraisal pro-

cess, it may be necessary to put the project out for public bid to determine its market value.

Once you establish the above, the tenant organization should be given a period of 60 days to present a proposal for the project including price, terms and method of ownership.

If an offer is received within the 60-day period, you should review it and make a determination, after considering all factors, as to whether it is in HUD's best interest to sell the project on that basis. Following that, you must provide your recommendation as to final disposition of the project as provided for in the regulations.

It is our understanding that the tenants are proposing a nonprofit form of ownership which would preclude residents from realizing any appreciated value on individual units, thereby avoiding "windfall" profits after disposition. This, they propose, would have the further benefit of keeping the housing cost to future residents at the cost of debt service on the disposition financing plus any necessary increases in operating expenses. Therefore, in reviewing a proposal from the tenants, you should assure yourself that this restriction is included.

For your further guidance, it should be understood clearly that the Department is under no obligation to sell to the tenants nor have any representations been made to that end. The staff of the Office of Multifamily Financing and Preservation will provide what assistance they can in pursuing this course of action. We do expect that you will cooperate fully with the tenants in exploring their proposal and consider as well the affect that your disposition recommendation will have on the tenants.

Lawrence B. Simons
Assistant Secretary

A-8

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C. 20410

Office of General Counsel

In Reply Refer to: GHM: DF: sm (202) 755-7107

Jan 12 1982

REGISTERED MAIL - RETURN RECEIPT REQUESTED

Ms. Ann Weseley
The First National Bank of Chicago
Worldwide Banking Department
International Trade Services Group
One First National Plaza
Chicago, Illinois 60670

Subject: Your Letter of Credit No.
FNBC 3402-00301654
Mandalay Shores
Project No. 067-00016

Dear Ms. Weseley:

Returned herewith is the above referenced letter of credit. We previously returned this letter of credit to you by letter from Robert P. Kalish dated December 10, 1981 (copy enclosed), wherein we advised you that the Department has no contractual relationship with Mandalay Shores Cooperative Housing Association, Inc. (MSCHA) which would provide a basis for the issuance of this letter of credit.

Notwithstanding the fact that there is no contract between the Department and MSCHA with respect to Mandalay Shores Apartments and that we previously refused to accept delivery of the letter of credit you have again transmitted the letter of credit.

Furthermore, the Department is not negotiating a sale with MSCHA. Rather the Department is currently involved in litigation with MSCHA and has a contract of sale of Mandalay

Shores Apartments with a third party. Your unwarranted insistence in tendering this letter of credit may prove prejudicial to our interests in these matters. If so, we shall take whatever action may be necessary to protect our interests.

Sincerely,

/s/ John A. Maxim, Jr.
Associate General Counsel for
Insured Housing and Finance

Enclosures

cc: Mr. F. J. Burr
Mandalay Shores Cooperative Housing Association
Clearwater, Florida

Dec 10 1981

REGISTERED MAIL
RETURN RECEIPT REQUESTED

The First National Bank of Chicago
Worldwide Banking Department
International Trade Services Group
Two First National Plaza
Chicago, Illinois 60670

Gentlemen:

Returned herewith is the irrevocable letter of credit FNBC: 3402-00301654, in the amount of $375,000, submitted on behalf of Mandalay Shores Cooperative Housing Association, Inc. (MSCHA), as a deposit on the purchase of Mandalay Shores Apartments. This deposit cannot be accepted since HUD has no contractural relationships with MSCHA.

Sincerely,

Robert P. Kalish, Director
Office of Multifamily
Financing and Preservation

cc:

HMFP	Master	6151	Mr. F. J. Burr
HMFP	Hilman	6151	President
HMFP	Chrono	6151	Mandalay Shores Cooperative
HMF	Kalish	6160	Housing Association, Inc.
HM	DAS	6106	880 Mandalay Avenue, Apt. 325
HAA	Corres.	9110	Clearwater, Florida 33515
GT	Ratner	10258	
GHM	Kennedy	9228	
ES	Ex. Sec.	10000	
SA	Wilson	10000	
4.6G	Area Counsel		Jacksonville, FL

HMFP: Buchheit:tal 12-8-81

FIRST CHICAGO
The First National Bank of Chicago

ONE FIRST NATIONAL PLAZA
Chicago, ILL 60670
Writer's Direct Dial Number: (312) 732-5298

Law Department

February 23, 1982

Mr. F.J. Burr
President
Mandalay Shores Cooperative Housing Association, Inc.
Apartment 325
880 Mandalay Avenue
Clearwater, Florida 33515

Re: Our Letter of Credit No. 301654 issued in favor of U.S. Department of Housing and Urban Development

Dear Mr. Burr:

Enclosed is a letter received by The First National Bank of Chicago from Mr. John A. Maxim, Jr., Associate General Counsel, Department of Housing and Urban Development, in connection with the above-referenced letter of credit. I have also enclosed a copy of two previous letters received from the Department of Housing and Urban Development, together with a copy of the letter of credit and amendment issued by The First National Bank of Chicago on behalf of Mandalay Shores Cooperative Housing Association, Inc.

As you can see from Mr. Maxim's letter, the Department of Housing and Urban Development has refused to accept our letter of credit and has returned the letter of credit and the amend-

ment to our Bank. The Department has requested that our Bank take appropriate action to ensure that we do not forward to the Department the letter of credit again.

In view of this correspondence we believe it is not appropriate for our Bank to continue to resend the letter of credit to the Department of Housing and Urban Development and we wish to advise you that we do not intend to take any further action with respect to the letter of credit. We suggest that your association take whatever action it deems appropriate under the circumstances.

Very truly yours,

JER:gro
enclosures

James E. Roselle
Senior Attorney

Dec 10 1981

REGISTERED MAIL
RETURN RECEIPT REQUESTED

The First National Bank of Chicago
Worldwide Banking Department
International Trade Services Group
Two First National Plaza
Chicago, Illinois 60670

Gentlemen:

Returned herewith is the irrevocable letter of credit FNBC: 3402-00301654, in the amount of $375,000, submitted on behalf of Mandalay Shores Cooperative Housing Association, Inc. (MSCHA), as a deposit on the purchase of Mandalay Shores Apartments. This deposit cannot be accepted since HUD has no contractural relationships with MSCHA.

Sincerely,

Robert P. Kalish, Director
Office of Multifamily
Financing and Preservation

cc:

HMFP	Master	6151	Mr. F. J. Burr
HMFP	Hilman	6151	President
HMFP	Chrono	6151	Mandalay Shores Cooperative
HMF	Kalish	6160	Housing Association, Inc.
HM	DAS	6106	880 Mandalay Avenue, Apt. 325
HAA	Corres.	9110	Clearwater, Florida 33515
GT	Ratner	10258	
GHM	Kennedy	9228	
ES	Ex. Sec.	10000	
SA	Wilson	10000	
4.6G	Area Counsel		Jacksonville, FL

HMFP: Buchheit:tal 12-8-81

A-9

MANDALAY SHORES APARTMENTS
Project No. 067-00016
Clearwater Beach, Florida

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
PROPERTY DISPOSITION PROGRAM

CONTRACT OF SALE AND PURCHASE
(ALL CASH)
Alfred Hoffman, Jr.
7211 N. Dale Mabry Highway, Suite 205
Tampa, Florida 33614

THIS INDENTURE, executed by the Purchaser this 3rd day of August 1981, by and between the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, hereinafter referred to as the Seller, and Alfred Hoffman, Jr., on behalf of Mandalay Associates, a Corporation to be formed, hereinafter referred to as the Purchaser.

WITNESSETH:

1. Under the terms and conditions hereinafter set out, the Seller agrees to sell and the Purchaser agrees to purchase the property situated in the City of Clearwater Beach, County of Pinellas, State of Florida, and more particularly described on the attached Exhibit "A".

Subject to easements, restrictions and reservations of record.

Together with the appurtenances and all articles of personal property and supplies owned by the Seller and used in connection with the operation of the property which may be located on the premises at the time of closing.

2. The agreed purchase price of said property is $6,232,716.00 - (Six million two (hundred thirty-two thousand seven hundred sixteen and 00/100 dollars), to be paid as follows:

311,635.80 in cash, which the Purchaser has deposited with the Seller as evidence of good faith and

to protect the Seller against loss or damage in the premises, receipt of which is acknowledged hereby, and

5,921,080.20 additional cash to be paid at closing.

In addition, the Purchaser assumes the obligation to pay all closing expenses including state or federal revenue, deed, or documentary stamp taxes, recording fees and any legal or title expense in connection with such continuation of or examination of title as may be required by the Purchaser.

3. Taxes, ground rents, sewer and water charges, garbage removal charges and all other operating expenses and operating income shall be prorated between the Purchaser and the Seller as of the close of business on the day this sale is closed, hereinafter referred to as the cut-off date. Casualty and surety coverages now carried by the Seller shall be cancelled as of the cut-off date.

4. All rents due and unpaid at the cut-off date shall be assigned to the Purchaser and all rents due after the cut-off date which have been collected by the Seller shall be paid over to the Purchaser.

5. All real property taxes and like charges against the property, including any improvement assessment installments (with interest), sewer and water charges, garbage removal charges and ground rents, due and payable on or before the cut-off date shall be paid by the Seller. The Purchaser shall pay and bear the expense of all improvement assessment installments (including interest) becoming due and payable after the cut-off date, and shall pay all real property taxes and such like charges accruing after the cut-off date.

EXHIBIT "A"

Situated in the City of Clearwater Beach, County of Pinellas, State of Florida, and more particularly described as follows, to wit:

Block 21 Mandalay Subdivision as recorded in Plat Book 14, pages 32 to 35 inclusive of the public records of Pinellas County, Florida: being more completely described as follows:

Beginning at the Northwest corner of Lot 6 Block 7 of said Mandalay Subdivision; thence North 0 degrees 49 minutes 39 seconds East 610.12 feet to the Southwest corner of Lot 1 Block 52 of said Mandalay Subdivision; thence South 86 degrees 16 minutes 41 seconds East 135.37 feet along the line between Blocks 21 and 52; thence along the Northerly line of Block 21, along a curve to the left, Radius 80.0 feet, Arc- 58.19 feet Chord- 56.89 feet bearing South 63 degrees 54 minutes 22 seconds East; thence along a curve to the right, Radius 922.67 feet, Arc- 136.33 feet, Chord- 136.20 feet, bearing South 80 degrees 29 minutes 59 seconds East; thence along a curve to the right, Radius- 261.50 feet, Arc- 352.90 feet, Chord- 326.79 feet, bearing South 37 degrees 36 minutes 01 seconds East; thence continue along a curve to the right, Radius- 261.50 feet; Arc- 346.10 feet, Chord- 321.37 feet, bearing South 38 degrees 59 minutes 04 seconds West; thence along a curve to the right, Radius- 922.67 feet, Arc- 143.28 feet, Chord- 143.14 feet, bearing South 81 degrees 21 minutes 13 seconds West; thence along a curve to the left, Radius- 80.0 feet, arc- 54.74 feet, Chord- 53.68 feet, bearing South 66 degrees 11 minutes 52 seconds West to the Northeast corner of Lot 6 Block 7 of said Mandalay Subdivision; thence South 89 degrees 12 minutes 57 seconds West 135.88 feet along the line between Blocks 21 and 7 to the Northwest corner of said Lot 6 Block 7, and point of beginning.

6. No representations are made by the Seller as to the physical condition of the property to be conveyed, the number and occupancy of revenue producing units or any factor bearing upon the valuation of the property. The Purchaser agrees to accept said property in its present condition and subject to existing leases and tenancies. Prior to the closing of the sale the Seller assumes the risk of loss from damage to the property by any cause (including but not limited to fire, flood, earthquake, tornado and vandalism) other than willful acts or neglect of the Purchaser, and in the event of such damage will provide for the restoration of the property to a condition as good as prior thereto, except that if such damage is so extensive that the Seller is unwilling so to restore the property, the Seller may rescind this agreement of sale by sending written notice to the Purchaser, and the sending of such notice shall release the Seller from any and all claims arising from this transaction.

7. The form of conveyance shall be a special warranty deed in the form customarily used in the jurisdiction in which the property is located and in which the Seller warrants to defend title to the property against the lawful claims of all persons claiming by, from, through or under the grantor therein. Transfer of title and possession shall become effective midnight the date of closing.

8. The Seller agrees to accord the Purchaser the privilege of inspecting such books, records, leases and title papers in his possession pertaining to the property hreein described as may be desired by the Purchaser; and the Purchaser is to have a period of three weeks from the date hereof (or such extension thereof as may be agreed to in writing) within which to notify the Seller of any objection to title; and, if no objection is made within such period, the Purchaser agrees to accept the title in its present condition. If any defect in title appears that would render the property unmarketable, and that cannot be cured within a reasonable time, or Seller is unable or unwilling to cure the objection, the Purchaser shall have the right to terminate this contract and, in the event of such title defect, the Seller reserves the right to rescind this agreement and to notify Purchaser in writing, and the sending of such notice shall release the Seller from any and all claims of the Purchaser arising hereunder.

9. Time is of the essence of this contract. The sale shall be closed within 60 days following the execution hereof by the Seller at the offices of the Seller, or at such other time and place as may be agreed on by the parties in writing. Should the Purchaser fail or refuse to perform his part of the contract promptly at the time or in the manner herein specified, the earnest money deposited herewith shall be retained as liquidated damages. Extensions of time to close the sale are entirely within the Seller's discretion. If granted, extensions will be for a maximum of 30 days each, and on the following conditions:

a. A written request for an extension of the 60 day period must be received by the Secretary *before* the expiration of the 60 day period and must be accompanied by the required additional deposit. The request must state the reason for the Purchaser's inability to close the sale within the initial 60 day period.

b. For each 30 day extension, an additional deposit of 2% of the purchase price will be required.

c. For each 30 day extension, the entire additional deposit will be an extension fee to be retained by the Seller and will not be credited to the amount due at closing.

d. If the Purchaser closes prior to the expiration of an extension period, the prorated amount of the extension fee, for the unused portion of the extension, will be credited toward the amount due at closing.

e. In the event the Purchaser fails to close the sale prior to the expiration of the last 30 day extension, the original earnest money deposit and all additional money deposits paid in connection with extensions shall be retained as liquidated damages.

f. The granting of one or more 30 day extensions shall not obligate the Seller to grant additional 30 day extensions, and the Seller may declare a default for the Purchaser's failure to close the sale upon the expiration of the original 60 day period or upon expiration of any extension thereof.

10. No Member of Congress or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

11. It is understood and agreed that the provisions of paragraphs 3, 4 and 5, above, will not be consummated before the closing of the sale, but that the same shall be held open for subsequent adjustment by a Collateral Agreement to be executed at closing by the Seller and the Purchaser.

12. This contract shall be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns, but shall not be assignable without the written consent of the Seller. Any request for such consent shall be submitted in writing and shall enumerate each person holding or to hold as much as 10% interest in the proposed assignee. Seller will be allowed 30 days in which to act upon any such request.

13. Purchaser must provide to the satisfaction of the Seller a performance bond to assure completion of the rehabilitation in the sum of $2,800,000.00 at closing.

14. Purchaser and Seller will execute a separate agreement at closing wherein Purchaser agrees that in the event of reacquisition pursuant to the Deed restrictions, Purchaser will pay all HUD's litigation costs and costs of the operation of the project from sales closing to reacquisition.

15. See Appendix "A" attached hereto and made a part hereof.

IN WITNESS WHEREOF, the Purchaser has executed this instrument in triplicate the day and year first above written and the Seller has executed this instrument in triplicate this 16th day of October 1981.

WITNESS AS TO SELLER:

/s/

/s/

SECRETARY OF HOUSING AND URBAN DEVELOPMENT

By /s/
Robert P. Kalish, Director
Office of Multifamily
Financing and Preservation

WITNESS AS TO PURCHASER:

/s/

/s/

/s/
Purchaser
Alfred Hoffman, Jr.
August 3, 1981

HUD-9654 February 1972

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
PROPERTY DISPOSITION PROGRAM

In determining the acceptability of bidders Department of Housing and Urban Development is concerned with the experience and ability of the individuals comprising the ownership to provide management and operation of an acceptable order. For this reason HUD will not knowingly accept the bid of those whose background or experience would indicate other than a reputation for sound and irreproachable business practices, nor will HUD knowingly accept a bid when there is indication of an intent by those submitting the bid to substitute others either known or unknown. The following affidavit is required.

AFFIDAVIT OF OWNERSHIP

Personally appeared this day before me, a Notary Public in and for State of Florida, County of Hillsborough the 14th day of September, 1981

Alfred Hoffman, Jr., on behalf of Mandalay Associates, a Limited Partnership to be formed.

well known by me and known by me to be the affiant(s) subscribing hereto. First being duly sworn by me affiant(s) stated that (1) this affidavit is given for the purpose of obtaining consideration by Department of Housing and Urban Development of a bid for the purchase of certain real property publicly offered by HUD, (2) said bid is executed by affiant(s) as the duly authorized representative(s) of the proposed owners, (3) the bid is made exclusively in behalf of the proposed owners named hereinafter and without the present contemplation of substitution, and (4) the proposed ownership will be as follows:

Portion to be owned (if corporation, give number of shares or percentage of total)	Owners Will Be (Give full name and address)
24.5%	Alfred Hoffman, Jr. - Limited Partner 7211 N. Dale Mabry Highway Suite 205 Tampa, Florida 33614
35.5%	Charles Rutenberg - General Partner 2900 U.S. Highway 19 North Clearwater, Florida 33515
40.0%	Richard Segal - General Partner 11340 Olympic Boulevard Suite 222 Los Angeles, California 90064

Alfred Hoffman, Jr. _____ Affiant

_____ Affiant

_____ Affiant

WITNESS my hand and seal this 14th day of September 1981.

Carol Schwartz

Notary Public, State of Florida at Large
My Commission Expires Aug. 6, 1983
Bonded by American Fire &
Casualty Company

Replaces Form FHA-1216, which is obsolete

HUD-9654

HUD-9654 February 1972

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Personally appeared this day before me, a Notary Public in and for State of Florida, County of Hillsborough the 3rd day of August, 1981

Alfred Hoffman, Jr., on behalf of Mandalay Associates, a Corporation to be formed.

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Portion to be owned (if corporation, give number of shares or percentage of total)	Owner(s) Will Be (Give full name and address)
27.3%	Alfred Hoffman, Jr. 7211 N. Dale Mabry Highway Suite 205 Tampa, Florida 33614
32.7%	Charles Rutenberg 2900 U.S. Highway 19 North Clearwater, Florida 33515
40.0%	Richard Segal 11340 Olympic Boulevard Suite 222 Los Angeles, California 90064

Alfred Hoffman, Jr. _____ Affiant

_____ Affiant

_____ Affiant

WITNESS my hand and seal this 3rd day of August 1981.

Carol Schwartz

Notary Public, State of Florida at Large
My Commission Expires Aug. 6, 1983
Bonded by American Fire &
Casualty Company

Replaces Form FHA-1216, which is obsolete

HUD-9654

62-A

A-10

FIRST CHICAGO
First National Bank of Chicago

International Trade Services Group
Suite 0236
Chicago, Illinois 60670 U.S.A.

Cable Address NATIONAL CHICAGO Telex number: 2-53801
Date: November 27, 1981

Duplicate Original

Mail
All Drafts Drawn Must Be Marked:
FNBC: 3402-00301654
Opener's Reference No: 301654

Samuel R. Pierce, Jr.,
As Secretary of U. S. Department of
Housing and Urban Development or
His Successor in Office

Gentlemen:

By the order of:

Mandalay Shores Cooperative
Housing Association, Inc., DIP
(MSCHA)
880 Mandalay Ave.
Clearwater, FL 33515

We hereby issue in your favor our irrevocable credit for the account of MSCHA for an amount or amounts not to exceed in the aggregate US dollars 375,000.00 (three hundred seventy five thousand and no/100 US dollars) available by your drafts at sight on the First National Bank of Chicago, Chicago, IL. U.S.A. effective November 27, 1981 and expiring at our office on February 8, 1982.

Funds under this credit are available against your draft(s) mentioning our credit number as it appears above.

The below-mentioned documents must be presented at sight on or before the expiry date on this instrument in accordance with the terms and conditions of this letter of credit.

Beneficiary's signed statement certifying that, "all proceeds of the draft will be used toward the purchase of the Mandalay Shores Apartments, FHA Project No. 067-00016, situated on Clearwater Beach, Florida, Pinellas County, together with the appurtenances thereto belonging and the personal property therein contained which is owned by the Secretary of HUD, all pursuant to MSCHA offer of $7,500,000.00 "as is" and title to be conveyed by warranty deed in form customarily used in the County of Pinellas, State of Florida, showing Mandalay Shores Cooperative Housing Association, Inc., as the Grantee."

We engage with you that drafts drawn under and in conformity with the terms of this credit will be duly honored on presentation if presented on or before the expiry date. The original letter of credit must accompany the documents required under this credit.

The credit is subject to the uniform customs and practice for documentary credits (1974 revision), International Chamber of Commerce-Publication 290.

Please address all correspondence regarding this Letter of Credit to the attention of our WBD Letter of Credit, International Trade Services, mentioning our reference number as it appears above.

Very truly yours

The First National Bank of Chicago

/s/
Authorized Signature

A-11

MANDALAY SHORES COOPERATIVE
HOUSING ASSOCIATION, INC.
880 Mandalay Avenue
Clearwater Beach, Florida 33515

OFFER TO PURCHASE

August 10, 1979

Secretary of Housing and Urban Development
of the United States
Att: J. C. Coile, Assistant Area Manager,
Jacksonville, Florida

By Hand Delivery

Dear Mr. Coile:
Pursuant to our many conversations, on behalf of the Mandalay Shores Cooperative Housing Association, Inc. (a not for profit Florida Corporation) we hereby offer to purchase from HUD the property situated at 880 Mandalay Avenue, Clearwater, Florida otherwise known as Mandalay Shores Apartments, F. H. A. project number 067-00016 which property is presently held and owned by the Secretary of Housing and Urban Development in fee simple title together with all of the inventory of the personal property as contained in the inventory records found in the Federal Court files in Tampa, Florida. A copy of which inventory is hereto attached as Exhibit #1.

We also attach hereto a copy of the deed conveying the property from the Zenith Industries Co. to the Secretary of Housing and Urban Development dated Mar. 1, 1977 recorded document #77030761 official records Pinellas County, Florida and as an additional exhibit a copy of the Chicago Title and Trust Company policy showing a value at the time of conveyance to HUD of Seven Million One Hundred Sixty One Thousand, Nine Hundred Thirty Six Dollars and Thirty Seven Cents ($7,161,936.37). The aforementioned not-for-profit organization was formed and a permanent slate of directors and officers were elected and installed on August 7, 1979.

The purpose of forming this not-for-profit Cooperative Housing Corporation was to exercise the congressional priority granted to residents of HUD held or HUD insured properties to acquire

the title to said property under the National Housing Act. We hereby exercise all of those rights. Attached hereto as Exhibit #3 is a set of copies of the petitions which were subscribed to by approximately 308 permanent residents of Mandalay Shores Apartments.

The priorities of acquisition available to residents of Mandalay Shores was exercised by virtue of the formation of the not-for-profit corporation and the preparation and submission of this proposal. By virtue of this proposal HUD is required to accept this offer as tendered within thirty days from the date hereof or in the event said proposal is rejected, to state with particularity the reasons for its rejection.

The attached exhibits are for the purpose of demonstrating to HUD that 1. We know that the property was obtained by HUD for $7,161,936.37. 2. We represent to HUD that we have possession of two independent MAI appraisals of subject property which reflect a property valuation of $6,100,000.00 up to $7,770,500.00. The variation being due to differences in existing and proposed mortgages at different rates of interest.

We offer to pay HUD a price of Seven Million Five Hundred Thousand Dollars ($7,500,000.) for the real and personal property herein above described. This offer is subject to the following terms and conditions:

A. That the property be rehabilitated, renovated and restored to a suitable usable condition, especially requiring the replacements and repairs as are hereinafter set forth.

B. That this offer is subject to our obtaining mortgage financing inclusive of 95% the purchase price and 100% of the cost of said rehabilitation, repairs and replacements. Mortgage to be HUD held or FHA insured.

C. That the term of said mortgage shall not be less than forty (40) years and that the maximum debt service payments including mortgage insurance premium, reserve for replacements, shall not exceed Forty Thousand Dollars ($40,000.00) per month aggregating Four Hundred and Eighty Thousand Dollars ($480,000.00)

per annum. That in the event that said debt service payments do not fully cover amortization required under the mortgage of principle and interest, that any unpaid amount of said interest and/or principle would be payable at maturity date of the note forty years hence as a balloon payment.

D. That if in the event that HUD elects to hold said mortgage as a HUD held mortgage, then the standard regulatory agreement shall be executed by the undersigned corporation. All mortgage instruments and security agreements to be executed by said corporation acting by and through its designated officials. In the event that HUD prefers to issue its FHA mortgage insurance that said mortgage may be placed with recognized FGA mortgage underwriter who will then service said loan such as but not limited to Dovenmuhl Inc. in Chicago who would then be servicing said mortgage and be responsible to HUD for the prompt remittance of all payments made thereon.

This corporation knows that the maximum rents set and allowable by HUD on said property (as to the apartments) are One Million Two Hundred Eighty Four Thousand Dollars ($1,284,000.00) not including carports, garages, rents on beauty parlor and restaurant and washing machine income. That any increase in said rents were not authorized by HUD and if the debt service expressed above were to be increased to any level higher than Forty Thousand Dollars ($40,000.00) per month including the replacement reserves and mortgage insurance, it would tend to create an inflationary spiral to the detriment of the residents of Mandalay Shore Apartments.

This would be contrary to the National policy of HUD and contrary to the best interests of the citizens of the United States and of this building.

With reference to rehabilitation of the subject property, as residents thereof, we have knowledge that from the date that this property was erected as a retirement multi-family dwelling complex under an FHA insurance committment and subsequently placed into the hands of HUD as a title holder, there have been no substantial repairs, replacements or rehabilitation.

The carpeting on all of said twelve floors is largely and basically the original carpeting about sixteen years old which has been patched in various places with various colors and with various colors of mystic cloth tape or colored tape. We also know that none of the hallways in any of the structure have been redecorated from the day the building was built. We also know that when various leaks sprung in the various areas of the apartments it was HUD's policy to break a hall wall open to repair the pipe by placing a clamp on the leak rather than to replace the pipe. Then the hole in the wall was allowed to remain open and was covered in various ways with plastic film or a piece of aluminum. The tenth floor has had horizontal pipes replaced some years ago but the elbow joints were never properly replaced and have leaked ever since. The ceiling on the 10th floor had to be broken down completely to gain access to the pipes. The ceiling was replaced with a suspended ceiling with accoustical wall board but having failed to repair the roof before replacing said ceiling the roof leaked and the pipes leaked and the ceiling was destroyed. That ceiling has never yet been replaced.

The exterior of the building has never been steam cleaned or painted since it was erected. The roof has never been scraped and restored, and should be replaced.

About 3 years ago the exterior of the building at the South end lost a large section of the stucco. Said hole has never been replaced or restored by HUD and during the tenure of the receivership and thereafter, HUD had obtained a bid to restore the stucco but elected not to spend the money. It is an eye sore and a blight to the neighborhood, which has caused many complaints to be registered with the residents but is a matter beyond our control.

Most of the pipes vertical runs throughout the building need to be replaced with copper piping. To the extent that this can be done without great inconvenience to the residents it is the plan of this corporation to have a contractor prepare a proposal showing how best these pipes can be replaced to eliminate further leaking and improve the condition of the property.

The airconditioning system at Mandalay Shores was installed by the Carrier Corp. when the building was erected. It is a chilled water cooling system containing approximately 750 tons of air conditioning capacity. The cooling tower on the roof has long

outlived its usefulness. The tubing is corroded beyond hope. The water cooling tower needs to be restored together with the squirrel cages and air handlers to modernize what is now considered to be an obsolete water tower cooling system. It is the plan of this corporation to require that the Carrier Corporation make a comprehensive bid to the Corporation, acting by and through its architect, to provide a restored cooling system to the building and to maintain the air cooling system on a regular basis as the responsibility of the Carrier Corporation in order to provide a more healthy and beneficial living condition for all of the residents of the property, many of whom are elderly and suffering from lung and/or heart conditions.

It is also important that every apartment in the building should be completely redecorated. The walls which have cracked and are discolored should be completely painted. The balconies need tuck pointing and repainting. The electrical fixtures in the hallways should all be replaced with fluorescent low cost electric lights in lieu of the incandescent fixtures which burn twenty-four hours a day and have been a terrible waste of electrical energy. The water meter installed in the building is oversized and money has been wasted for sixteen years to the City of Clearwater for water which is returned to the Gulf of Mexico for which we are paying a sewage charge which is completely out of line and that meter needs to be replaced with one of proper size to create further economy. The electric panel system is the property of the Florida Power Corporation. It has been rented to this building each year for increasingly higher amounts. That lease agreement should be terminated promptly to reduce our expense and the power company should be required to provide the electricity as they do to all other residential customers of the Public Service Company. The auxilliary electric system in the building is not adequate to provide for auxilliary electrical requirements and does not function in both ends of the building and sometimes not even in the center section. Many of the plumbing fixtures throughout the building have become corroded over sixteen years and cannot be repaired because they are obsolete and should be replaced with modern fittings.

All of these items are to be evaluated by structural engineers, by architects and bids should be let to determine what the cost of said rehabilitation will amount to. When these costs are fully known, these figures must be incorporated as aforesaid in the total mortgage financing figure.

Attached to this offer is our Bank Cashier's check payable to the Secretary of Housing and Urban Development in the amount of One Hundred Thousand Dollars ($100,000.00). If this offer is accepted as set forth herein, said $100,000.00 shall be part of the purchase price, otherwise said check shall be returned to us instanter.

We trust that HUD will accept this priority offer and we believe that this sale could be closed sixty days after notice of acceptance on the condition that aforesaid mortgage financing and the estimated cost of necessary repairs as hereinabove described have been obtained, and that HUD has delivered to us satisfactory evidence of good marketable lien free title in the form of a commitment for title insurance in the amount of Nine Million Five Hundred Thousand Dollars ($9,500,000) (for which the title insurer generally makes no charge).

Please advise us promptly of your acceptance of this offer so that rehabilitation costs can be investigated and determined.

Yours very truly,

Mandalay Shores Cooperative
Housing Association, Inc.

By: F. J. Burr, President

Attest

Corporate Seal
(Not-for-Profit)

Daniel E. Mann, Secretary-Treasurer

Encl.
FJB:hn

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In the Matter of:
MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC.,
Debtor.

Case No. 81-547

AFFIDAVIT

STATE OF FLORIDA:
COUNTY OF PINELLAS:

Before me, the undersigned authority, personally appeared F. J. Burr who after being first duly sworn deposes and says:

1. That he is the President of Mandalay Shores Cooperative Housing Association, Inc., (a Florida Not for Profit Corporation) (hereinafter referred to as MSCHA.)

2. That he has been actively engaged in negotiations with HUD for the acquisition of Mandalay Shores Apartments since August 10, 1979.

3. That he hand delivered MSCHA's $7,500,000.00 offer to purchase Mandalay Shores Apartments to HUD officials in Washington on August 20, 1979 with $100,000 cashier's check attached.

4. That subsequently said offer was amended to conform to HUD's requirements on July 11, 1980 and confirmed in writing on September 8, 1980, and August 6, 1981.

5. That MSCHA's amended offer was sent on August 6, 1981 by Certified Mail and was received by HUD.

6. That HUD acknowledged receipt of such $7,500,000 offer and among other things claimed that the offer was not "Responsive."

7. That MSCHA requested that HUD should reject all bids opened on August 5, 1981 because they were too low and did not protect the interests of the United States or the interests of the General Insurance Fund.

8. That in order to make MSCHA's amended $7,500,000 offer "Responsive" the Board of Directors of MSCHA resolved on September 24, 1981 to have the First National Bank of Chicago issue its irrevocable Commercial Bank Letter of Credit in the amount of $375,000 in favor of the Secretary of HUD toward the purchase of Mandalay Shores Apartments for $7,500,000 as per MSCHA's offer (copy of resolution attached hereto.)

9. That the terms of sale require that 5% of the purchase price must be submitted as earnest money with such offers; in this case $375,000 equals 5% of $7,500,000.

10. That on Saturday, November 14, 1981 the Affiant met with Congressman Bill McCullom who publicly promised to schedule a meeting for the Affiant and Lillian Rauh, a director of MSCHA, with a top HUD official for the week of November 16, 1981 at HUD Headquarters in Washington, DC to discuss the possibility of settling pending issues, including the prompt removal of deadly asbestos from Mandalay Shores Apartments.

11. That in these negotiations, it is deemed crucial to a showing of good faith that the issuance of the $375,000 Bank Letter of Credit be authorized by the Court and that such Order be entered and hand delivered to the appropriate HUD official at the impending meeting.

12. This affidavit is made in support of the Debtor's Application of October 3, 1981 for Emergency Order Approving the Issuance of Bank Letter of Credit payable to the Secretary of HUD towards the purchase of Mandalay Shores Apartments as per offer to pay $7,500,000 and for traveling expenses to meet with HUD in Washington, DC. The statements hereincontained are on personal knowledge, except as to those matters which are on information and belief and as to those matters the Affiant believes them to be true. The Affiant is competent to testify in the premises. Further, Affiant sayeth not.

F. J. Burr

Sworn to and Subscribed before me
this 16th day of November, 1981.

Notary Public State of Florida At Large
My Commission Expires Aug 19, 1985

/s/
Renee Riolo
Notary Public

My Commission Expires:

Mandalay Shores Cooperative
Housing Association, Inc.
A Non Profit Corporation
880 Mandalay Avenue
Clearwater, Florida 33515
(813) 446-0503

EXCERPT OF MINUTES OF EMERGENCY MEETING OF THE BOARD OF DIRECTORS OF MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION INC., DIP, HELD AT 10:00 AM ON SEPTEMBER 24, 1981 AT THE OFFICES OF THE CORPORATION

The following Resolution was passed unanimously by a quorum of the Directors present and voting at the above referenced meeting.

RESOLVED:
That the officers of this corporation be and they are hereby authorized to do all things necessary and required so to implement the intent and purposes of the Motion which carried, including but not limited, to cause the First National Bank Of Chicago to issue its irrevocable commercial bank letter of credit in the amount of $375,000 payable to Samuel R. Pierce, Jr., as Secretary of the U.S. Department of Housing and Urban Development, or his successor in office, on which the Secretary of HUD may draw a draft for the full amount as part payment of the purchase price of $7,500,000 "as-is" for the multifamily housing project known as Mandalay Shores Apartments, FHA Project No. 067-00016, together with the appurtenances thereto belonging and all personal property therein contained belonging to the Secretary of HUD. Title to said property to be conveyed to Mandalay Shores Cooperative Housing Association, Inc., by warranty deed in the form customarily used in the County of Pinellas, State of Florida. The property is legally described on Exhibit "A" hereto attached. All actions of the President, Vice President and Secretary-Treasurer, being F.J. Burr, Floyd J. Connors and Daniel E. Mann to carry out this Resolution are hereby authorized and ratified in their respective capacities. The bank may hold as collateral to the credit an equal sum on deposit in Certificate of Deposit now held in safe keeping by the Bank.

I HEREBY CERTIFY that the foregoing is a true and accurate copy of the Resolution adopted by this corporation on the date and at the time first above stated. This instrument is dated October 1, 1981.

_____
Daniel E. Mann, Secretary

EDITOR'S NOTE

PAGES 73A thru 76A WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

U.S. Department of Housing and Urban Development
Office of Housing

Mandalay Shores Apartments

Located at 880 Mandalay Avenue, Clearwater, Florida, fronting the Gulf of Mexico. Good access to downtown shopping at Clearwater Beach and the City of Clearwater. Local bus transportation available within walking distance.

Note: A recent law suit against the Department, Mandalay Shores Cooperative Housing Association, Inc. v. Moon Landrieu, et al., has been dismissed.

For Sale by Public Offering

U. S. Department of Housing and Urban Development invites bids for this project to be tendered in the manner indicated. All bids are net to HUD. Bidding instructions must be obtained from HUD. To qualify for consideration each bid on its face shall be firm, unconditional, responsive, fixed in one amount certain and not in the alternative.

Minimum price	**No Stated Minimum**
Terms	**All cash net to HUD**
Required deposit with bid	**5% of price bid**

Sealed bids will be received in Room 6151 and publicly opened in Room 9204 at 11:00 a. m. local time on **August 5, 1981** Office of Multifamily Financing and Preservation, U. S. Department of Housing and Urban Development, 451 Seventh Street, S. W., Washington, D. C.

Note: No consideration will be given to a bid submitted by any bidder currently suspended or debarred from participating in HUD programs.

ject Information

ndalay Shores Apartments, located at 880 Mandalay Avenue, arwater, Florida, consists of a 12-story elevator building with story interconnecting wings on each side, containing a total of 5 units. The complex also includes five commercial spaces, underground parking and carports, an olympic-size heated swimming pool and a concrete pier extending into the Gulf of Mexico. It was constructed in 1963 and acquired by HUD on March 1, 1977.

nstruction

ndation	Concrete
Walls	Concrete Block w/Stucco Finish
ors	Vinyl Asbestos & Carpet
fing	Built-up
ting	Diesel Fuel
Conditioning	Individual - Electric Chiller System
n. Hot Water	Diesel Fuel Boiler
ment	Partial

Utilities

Public water supply, electricity, sanitary and storm sewers
Gas available

Paving: Macadam streets and parking lot; concrete curbs and sidewalks

Tenant Services

Cold water, refuse removal, customary maintenance, metered laundry facilities, on-site parking, swimming pool, recreational facilities and master TV antenna

Equipment: Ranges and refrigerators

rrent Rentals

Units	Type	Monthly rate
123	Eff.	$194
181	1 BR	$265.75 - $293.75
82	2 BR	$335 - $399.75
5 commercial spaces	1 @ $280; 1 @ $330.75 - 3 vacant	
26 Underground Spaces	$650	
86 Carport Spaces	$1290	
ss annual rent roll	$1,255,524 (1)	

Approximate Expenses

1980 Real Estate Taxes: $154,366.10

Estimated annual cost of operation, maintenance and taxes $1,946,866.

Approximate monthly refuse removal, water and sewer $400.

cupancy Percentage

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
80				85	84	84	82	82	81	80	80	80
81	80	80	80									

s project has not been rented to its fullest capacity because of the cipated rehabilitation.

The current gross annual apartment rent roll (excluding commercial spaces and parking) is $1,224,915.

ome from metered laundry facilities is approximately $600 per month.

residential tenants are on month-to-month leases; commercial leases annual.

ject books and records, plans and specifications, and a complete breakdown will be available for inspection by prospective ders at the project site.

Due to the physical condition of the project and the shortage of rental housing in the area, the following special provisions apply to this sale.

1. The purchaser must rehabilitate the project, and remove/or contain the asbestos, in a manner acceptable to HUD. The Area Office will provide detailed plans and specifications at the project site and the Area Office. The purchaser will be required to pay all temporary relocation costs during the rehabilitation.
2. During the rehabilitation and for a period of 20 years after completion of repairs to the entire project, the purchaser must maintain all units in the project available for rental and may not market them for any other purpose without the prior written approval of the Secretary. The Owner shall give tenants written notice 30 days in advance of any request to approve a change in use and provide the opportunity, for tenants to present written comments.
3. The purchaser may not raise rents during the rehabilitation period covered by item 2. Thereafter, rents could be raised to market levels.
4. All bidders, with their bid, must provide written documentation to demonstrate the capability of financing not only the purchase price, but also the rehabilitation and potential deficit operation during the rehabilitation period.
5. The purchaser will be required to provide a performance bond at closing in the amount of $2,800,000 to assure completion of the rehabilitation.
6. The purchaser must agree that, in the event the agreement with HUD is violated, title to the project will revert to HUD with the purchaser bearing all costs associated with that action and the operation of the project from the date of sales closing until HUD reacquired title.

General Information

Purchaser will be required to accept the property without warranty as to physical condition.

Title to all equipment and chattels owned and used by the Secretary in the operation of the property will pass to the purchaser, but without warranty as to precise count and condition. Rehabilitation of the property is a condition of sale.

HUD or HUD's agents will conduct periodic inspections after sales closing to insure completion of rehabilitation in a satisfactory manner.

While care has been exercised to assure accuracy, all information provided is solely for the purpose of permitting parties to determine whether or not the property is of such type and general character as might interest them in its purchase, and **HUD makes no warranty as to the accuracy of such information.** Those interested are expected to acquaint themselves with the property, and to arrive at their own conclusions as to physical condition, number and occupancy of revenue producing units, estimates of operating costs, and any factors bearing upon valuation of the property.

Deposit with Bid. Bids must be accompanied by money order, certified, cashier's or other banker's check to U. S. Department of Housing and Urban Development for not less than the required deposit, to be applied on the purchase or returned if the bid is rejected.

The earnest money deposit required with bid will also be held on the second high bidder until the high bid is cleared by the Multifamily Participation and Review Committee and determined to be acceptable. If the high bid is not accepted, the earnest money will be refunded and the second high bid will be processed for acceptance.

A financial organization submitting a bid on its own behalf must have the earnest money deposit with bid drawn on another independent financial organization.

Terms of Sale. The purchaser must provide for payment of the full purchase price in cash. The sales contract, used as the bid form, is binding on acceptance by the Secretary and requires closing within 60 days. The right is reserved to reject any or all bids and to waive any informality in any bid.

The Deed executed at closing will prohibit discrimination in renting to Section 8 Certificate holders as set forth in the Contract of Sale and Purchase.

Prospective bidders are urged and invited to inspect the property. Inspections may be arranged Monday through Friday, between 9:00 A.M. and 4:00 P. M. local time by contacting either of the following:

Project Manager

Frank A. Hathaway
601 N. Primrose Drive
Orlando, Florida 32803
On-site Manager:
Ms. Jean Burton
Telephone: (813) 446-9577

HUD Area Office

Everett H. Rothschild, Area Mgr.
Peninsula Plaza
661 Riverside Avenue
Jacksonville, Florida 32204
Attention: Donald Hunt
Telephone: (904) 791-2812

Bidding Instructions

Bidding instructions may be obtained by mailing the form below.

HUD:

I am interested in submitting a bid on this property. Please send a Bidder's Kit and instructions for submitting a bid. My address is listed below. I understand that my request must be received by June 8, 1981, in order to allow time for delivery.

(please print or type)

name

address

city state zip code

thank you

Mandalay Shores Apartments, Clearwater, Florida
Project No. 067-00016

Prospectus and Invitation to Bid

Mandalay Shores Apartments
Clearwater, Florida

U.S. Department of Housing and Urban Development
Office of Housing

Postage and Fees Paid
Department of Housing
and Urban Development
HUD-401

. Department of Housing
Urban Development

shington, D.C. 20410

ial Business
alty for Private Use, $300

place
stamp
here

U.S. Department of Housing and Urban Development
Office of Housing
Multifamily Financing and Preservation
Room 6155
Washington, D.C. 20410

A13

Project No. 067-00016
Mandalay Shores Apartments
Clearwater Beach, Florida

O.R. 5318 Page 588C

82033996

DEED

THIS INDENTURE, made this 2nd day of March, 1982, by and between SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, of Washington, D.C., (hereinafter referred to as "Grantor"), and BANK OF CLEARWATER, a banking association organized under the laws of Florida, as Trustee under an unrecorded trust agreement dated March 1, 1982, Trust No. 48-1990-00 (hereinafter referred to as "Grantee"). 600 Cleveland St., Clearwater 33516.

WITNESSETH: That the said Grantor, for and in consideration of the sum of TEN DOLLARS ($10.00) to him in hand paid, and other valuable considerations, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and does hereby grant, bargain, sell, alien, remise, release, convey and confirm unto the said Grantee, and the successors and assigns of said Grantee, forever, all that certain parcel of land lying and being in the City of Clearwater Beach, County of Pinellas, State of Florida, and described on the attached Exhibit "A", provided that:

Rehabilitation:

The property conveyed will be rehabilitated within four (4) years from the date of this Deed in accordance with all applicable local codes, and asbestos will be removed or contained during the period of rehabilitation. Grantee, its successors and assigns, will pay all temporary relocation costs for relocating tenants in a manner acceptable to the Grantor, his successors and assigns.

Use Restrictions:

During rehabilitation and for a period of twenty (20) years after completion of repairs to the entire project, Grantee, for itself, its successors and assigns, agrees that it will not use the property for other than rental housing and that it will not market any units for any other purpose than rental housing for the aforesaid period, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee, or its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

Rental Rate Restriction:

For the period of rehabilitation, Grantee, for itself, its successors and assigns, agrees not to raise rents. After the rehabilitation period, rents may be raised to market rates.

Eviction Requirements:

During the rehabilitation and for a period of twenty (20) years after completion of the repairs to the entire project, Grantee, its successors and assigns, shall, with respect to eviction from the project, evict only for good cause as governed by 24 CFR, Part 450, or any successor regulations, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee, or its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

It is expressly agreed that upon failure to strictly keep and observe any of the provisions of the foregoing conditions, by the Grantee, its successors and assigns, the Grantor, his successors and assigns, may enter and terminate the estate hereby conveyed.

BEING the same property acquired by the Grantor pursuant to the provisions of the National Housing Act, as amended (12 USC 1701 et seq.), and the Department of Housing and Urban Development Act (79 Stat. 667).

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Grantor, of, in and to the same, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD the above granted and described premises with the appurtenances unto the Grantee, and the successors and assigns of said Grantee, to their only proper use, benefit and behoof forever, provided that:

Rehabilitation:

The property conveyed will be rehabilitated within four (4) years from the date of this Deed in accordance with all applicable local codes and asbestos will be removed or contained during the period of rehabilitation. Grantee, its successors and assigns, will pay all temporary relocation costs for relocating tenants in a manner acceptable to the Grantor, his successors and assigns.

Use Restriction:

During rehabilitation and for a period of twenty (20) years after completion of repairs to the entire project, Grantee, for itself, its successors and assigns, agrees that it will not use the property for other than rental housing and that it will not market any units for any other purpose than rental housing for the aforesaid period, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee, or its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

Rental Rate Restriction:

For the period of rehabilitation, Grantee, for itself, its successors and assigns, agrees not to raise rents. After the rehabilitation period, rents may be raised to market rates.

Eviction Requirements:

During the rehabilitation and for a period of twenty (20) years after completion of the repairs to the entire project, Grantee, its successors and assigns, shall, with respect to eviction from the project, evict only for good cause as governed by 24 CFR, Part 450, or any successor regulations, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee, or its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

It is expressly agreed that upon failure to strictly keep and observe any of the provisions of the foregoing conditions, by Grantee, its successors and assigns, the Grantor, his successors and assigns, may enter and terminate the estate hereby conveyed.

SUBJECT to all covenants, restrictions, reservations, easements, conditions and rights appearing of record; and SUBJECT to any state of facts an accurate survey would show.

AND the said Grantor does hereby specially warrant the title to said land against the lawful claims of all persons claiming by, through or under him.

SAID premises shall be subject to the following:

Section 8 Requirements:

The Grantee, for itself, its successors and assigns, covenants with the Grantor, his successors and assigns and third-party beneficiaries, that certain restrictive covenants will be applicable to the property conveyed, and it is the intention of the parties that these covenants will run with the land. The purpose of these covenants is to implement the provisions of Section 204 of the Housing and Community Development Amendments of 1978.

The Grantee, for itself, its successors and assigns, agrees not to refuse unreasonably to lease a vacant dwelling unit, evict any person or otherwise discriminate in the terms of tenancy because such person is the holder of, or

eligible to hold, a Certificate of Family Participation under Section 8 of the United States Housing Act of 1937 (42 USC 1437f), or any successor legislation (hereinafter referred to as Section 8); Provided, that this provision is limited to those units which rent for an amount not greater than the fair market rent for a comparable unit in the area as determined by the Grantor under Section 8.

These covenants and agreements shall bind the Grantee, its successors and assigns, for a period of twenty (20) years from the date of this Deed. In the event of a breach or a threatened breach of any of these covenants and agreements, the Grantor, his successors and assigns and/or one or more third-party beneficiaries, shall be entitled to institute legal action to enforce performance and observance of such covenants and agreements. For the purposes of these covenants, a third-party beneficiary shall be any person who holds, or is eligible to hold, a Certificate of Family Participation under the aforesaid Section 8 of the Housing Act of 1937.

FULL POWER AND AUTHORITY is hereby granted to said Grantee to subdivide and resubdivide the real estate or any part thereof; to dedicate parks, streets, highways or alleys and to vacate any subdivision or part thereof; to execute contracts to sell or exchange, or execute grants of options to purchase, to execute contracts to sell on any terms, to convey either with or without consideration; to convey the real estate or any part thereof to a successor or successors in trust and to grant to such successor or successors in trust all of the title, estate, powers and authorities vested in the Grantee; to donate, to dedicate, to mortgage, or otherwise encumber the real estate, or any part thereof; to execute leases of the real estate, or any part thereof, from time to time, in possession or reversion, by leases to commence in praesenti or futuro, and upon any terms and for any period or periods of time, and to execute renewals or extensions of leases upon any terms and for any period or periods of time and to execute amendments, changes or modifications of leases, and the terms and provisions thereof at any time or times hereafter; to execute contracts to make leases and to execute options to lease and options to renew leases and options to purchase the whole or any part of the reversion and to execute contracts respecting the

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Petitioner's Footnote: Unadvertized changes and relaxed terms of deed are shown in bold face type.

manner of fixing the amount of present or future rentals, to execute grants of easements or charges of any kind; to release, convey or assign any right, title or interest in or about or easement appurtenant to the real estate or any part thereof, and to deal with the title to said real estate and every part thereof in all other ways for such other considerations as it would be lawful for any person owning the title to the real estate to deal with it, whether similar to or different from the ways above specified and at any time or times hereafter.

In no case shall any party dealing with said Grantee in relation to the real estate, or to whom the real estate or any part thereof shall be conveyed, contracted to be sold, leased or mortgaged by the Grantee, be obliged to see to the application of any purchase money, rent or money borrowed, or advanced on the real estate, or be obliged to see that the terms of the trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Grantee or be obliged or privileged to inquire into any of the terms of the trust agreement; and every deed, trust deed, mortgage, lease or other instrument executed by the Grantee in relation to the real estate shall be conclusive evidence in favor of every person relying upon or claiming under any such conveyance, lease or other instrument, (a) that at the time of the delivery thereof the trust created herein and by the trust agreement was in full force and effect; (b) that such conveyance or other instrument was executed in accordance with the trusts, conditions and limitations contained herein and in the trust agreement or in any amendments thereof authorized and binding upon all beneficiaries: (c) that the Grantee was duly authorized and empowered to execute and deliver every such deed, trust deed, lease, mortgage or other instrument; and (d) if the conveyance is made to a successor or successors in trust, that such successor or successors in trust have been properly appointed and are fully vested with all the title, estate rights, powers, authorities, duties and obligations of its, his or their predecessor in trust.

The interest of each beneficiary under the trust agreement and of all persons claiming under them or any of them shall be only in the possession, earnings and the avails and proceeds arising from the sale, mortgage or

other disposition of the real estate, and such interest is hereby declared to be personal property, and no beneficiary shall have any title or interest, legal or equitable, in or to the real estate as such, but only an interest in the possession, earnings, avails and proceeds thereof as aforesaid.

IN WITNESS WHEREOF, the undersigned has set his hand and seal as authorized agent for an on behalf of the said Secretary of Housing and Urban Development, under authority and by virtue of

Signed, acknowledged and delivered in the presence of:

SAMUEL R. PIERCE, JR.
SECRETARY OF HOUSING
AND URBAN
DEVELOPMENT

/s/

By: /s/
Robert P. Kalish, Director,
Office of Multifamily
Financing and Preservation

/s/

DISTRICT OF COLUMBIA, ss:

Before me personally appeared Robert P. Kalish, who is personally well known to me and known to me to be the duly appointed Director, Office of Multifamily Financing and Preservation and the person who executed the foregoing instrument bearing date of March , 1982, by virtue of the authority vested in him by Federal Register, Volume 45, No. 179, Friday, September 12, 1980 at page 60823, and acknowledged before me that he executed the same as such officer for and on behalf of Samuel R. Pierce, Jr., Secretary of Housing and Urban Development, for the purposes therein expressed.

WITNESS my hand and official seal this 2nd day of March, 1982.

/s/
Notary Public in and for the
District of Columbia

My commission expires:
March 31, 1985

EXHIBIT "A"

Block 21 Mandalay Subdivision as recorded in Plat Book 14, pages 32 to 35 inclusive of the public records of Pinellas County, Florida: being more completely described as follows:

Beginning at the Northwest corner of Lot 6 Block 7 of said Mandalay Subdivision; thence North 0 degrees 49 minutes 39 seconds East 610.32 feet to the Southeast corner of Lot 1 Block 52 of said Mandalay Subdivision; thence South 86 degrees 16 minutes 41 seconds East 135.37 feet along the line between Blocks 21 and 52; thence along the Northerly line of Block 21, along a curve to the left, Radius 80.0 feet, Arc- 58.19 feet Chord- 56.89 feet bearing South 63 degrees 54 minutes 22 seconds East; thence along a curve to the right, Radius 922.67 feet; Arc- 136.33 feet, Chord- 136.20 feet, bearing South 80 degrees 29 minutes 59 seconds East; thence along a curve to the right, Radius- 261.50 feet, Arc- 352.90 feet, Chord- 326.79 feet, bearing South 37 degrees 36 minutes 01 seconds East; thence continue along a curve to the right, Radius- 261.50 feet; Arc- 346.10 feet, Chord- 321.37 feet, bearing South 38 degrees 59 minutes 04 seconds West; thence along a curve to the right, Radius- 922.67 feet, Arc- 143.28 feet, Chord- 143.14 feet, bearing South 81 degrees 21 minutes 13 seconds West; thence along a curve to the left, Radius- 80.0 feet, arc- 54.74 feet, Chord- 53.68 feet, bearing South 66 degrees 11 minutes 52 seconds West to the Northeast corner of Lot 6 Block 7 of said Mandalay Subdivision; thence South 89 degrees 12 minutes 57 seconds West 135.88 feet along the line between Blocks 21 and 7 to the Northwest corner of said Lot 6 Block 7, and point of beginning.

Together with all right, title and interest of the grantors in and to the land lying in the streets and roads in front of and adjoining said premises.

Together with the land, if any, lying between the westerly line of the premises and the mean high water line of the Gulf of Mexico as the same may exist from time to time.

A14

Project No. 067-00016
Mandalay Shores Apartments
Clearwater Beach, Florida

APPENDIX "A"

The Deed to be executed by Seller shall be in the following form:

Deed for Florida

THIS INDENTURE, Made this day of , 19 , by and between Samuel R. Pierce, Jr., Secretary of Housing and Urban Development, of Washington, D.C., (hereinafter referred to as "Grantor"), and , (hereinafter referred to as "Grantee(s)"),

WITNESSETH: That the said Grantor, for and in consideration of the sum of TEN DOLLARS ($10.00) to him in hand paid and other valuable considerations, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, alien, remise, release, convey and conform unto the said Grantee(s), and the heirs and assigns of said Grantee(s), forever, all that certain parcel of land lying and being in the City of Clearwater Beach, County of Pinellas, State of Florida, and described on the attached Exhibit "A", provided that:

Rehabilitation:

The property conveyed will be rehabilitated within four (4) years from the date of this Deed in accordance with all applicable local codes and asbestos will be removed or contained during the period of rehabilitation. Grantee(s), its successors and assigns, will pay all temporary relocation costs for relocating tenants in a manner acceptable to the Grantor, his successors and assigns.

Use Restriction:

During rehabilitation and for a period of 20 years after completion of repairs to the entire project, Grantee(s), its successors and assigns, agrees that it will not use the property for other than rental housing and that it will not market any units for any other purpose than rental housing

for the aforesaid period, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee(s), its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

Rental Rate Restriction:

For the period of rehabilitation, Grantee(s), its successors and assigns, agrees not to raise rents. After the rehabilitation period, rents may be raised to market rates.

Eviction Requirements:

During the rehabilitation and for a period of 20 years after completion of the repairs to the entire project, Grantee(s), its successors and assigns, shall, with respect to eviction from the project, evict only for good cause as governed by 24 CFR, Part 450 or any successor regulations, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee(s), its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

It is expressly agreed that upon failure to strictly keep and observe, any of the provisions of the foregoing conditions, by the Grantee(s), its successors and assigns, the Grantor, his successors and assigns, may enter and terminate the estate hereby conveyed.

BEING the same property acquired by the Grantor pursuant to the provisions of the National Housing Act, as amended (12 USC 1701 et seq.) and the Department of Housing and Urban Development Act (79 Stat. 667).

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Grantor, of, in and to the same, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD the above granted and described premises with the appurtenances, unto the Grantee(s), and the heirs and assigns of said Grantee(s), to their only proper use, benefit and behoof forever, provided that:

Rehabilitation:

The property conveyed will be rehabilitated within four (4) years from the date of this Deed in accordance with all applicable local codes and asbestos will be removed or contained during the period of rehabilitation. Grantee(s), its successors and assigns, will pay all temporary relocation costs for relocating tenants in a manner acceptable to the Grantor, his successors and assigns.

Use Restriction:

During rehabilitation and for a period of 20 years after completion of repairs to the entire project, Grantee(s), its successors and assigns, agrees that it will not use the property for other than rental housing and that it will not market any units for any other purpose than rental housing for the aforesaid period, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee(s), its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

Rental Rate Restriction:

For the period of rehabilitation, Grantee(s), its successors and assigns, agrees not to raise rents. After rehabilitation period, rents may be raised to market rates.

Eviction Requirements:

During the rehabilitation and for a period of 20 Years after completion of the repairs to the entire project, Grantee(s), its successors and assigns, shall, with respect to eviction from the project, evict only for good cause as governed by 24 CFR, Part 450 or any successor regulations, unless it receives prior written approval of the Grantor, his successors and assigns. Said approval may be granted only if the Grantee(s), its successors and assigns, demonstrates a substantial change in the need for rental housing since the date of this Deed.

It is expressly agreed that upon failure to strictly keept and observe, any of the provisions of the foregoing conditions, by Grantee(s), its successors and assigns, the Grantor, his successors and assigns, may enter and terminate the estate hereby conveyed.

SUBJECT to all covenants, restrictions, reservations, easements, conditions and rights appearing of record; and SUBJECT to any state of facts an accurate survey would show.

AND the said Grantor does hereby specially warrant the title to said land against the lawful claims of all persons claiming by, through or under him.

SAID premises shall be subject to the following:

Subject 8 Requirements:

The Grantee, for itself, its successors and assigns, covenants with the Grantor, its successors and assigns and third-party beneficiaries, that certain restrictive covenants will be applicable to the property conveyed, and it is the intention of the parties that these covenants will run with the land. The purpose of these covenants is to implement the provisions of Section 204 of the Housing and Community Development Amendments of 1978.

The Grantee, for itself, its successors and assigns, agrees not to refuse unreasonably to lease a vacant dwelling unit, evict any person or otherwise discriminate in the terms of tenancy because such person is the holder of, or eligible to hold, a Certificate of Family Participation under Section 8 of the United States Housing Act of 1937 (42 USC 1437f), or any successor legislation (hereinafter referred to as Section 8); Provided, that this provision is limited to those units which rent for an amount not greater than the fair market rent for a comparable unit in the area as determined by the Grantor under Section 8.

These covenants and agreements shall bind the Grantee, its successors and assigns, for a period of twenty (20) years from the date of this Deed. In the event of a breach or a threatened breach of any of these covenants and agreements, the Grantor, its successors and assigns and/or one or more third-party beneficiaries, shall be entitled to institute legal action to enforce performance and observance of such covenants and agreements

and to enjoin any acts which are violative of such covenants and agreements. For the purposes of these covenants, a third-party beneficiary shall be any person who holds, or is eligible to hold, a Certificate of Family Participation under the aforesaid Section 8 of the Housing Act of 1937.

IN WITNESS WHEREOF the undersigned has set his hand and seal as Area Office, HUD Area Office, Florida, for and on behalf of the said Secretary of Housing and Urban Development, under authority and by virtue of 35 FR 16106, as amended.

Signed, acknowledged and delivered in the presence of:

Samuel R. Pierce, Jr.
Secretary of Housing and
Urban Development

_____ By_____

_____

STATE OF FLORIDA
COUNTY OF : ss

Before me personally appeared , who is personally well known to me and known to me to be the duly appointed Area Office, HUD Area Office, Florida, and the person who executed the foregoing instrument bearing date of , 19 , by virtue of the authority vested in him by 35 FR 16106, as amended, and acknowledged before me that he executed the same as Area Office, for and on behalf of Samuel R. Pierce, Jr., Secretary of Housing and Urban Development, for the purposes therein expressed.

WITNESS my hand and official seal this day of , 19 .

(SEAL)

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Notary Public in and for the
County and State aforesaid

My Commission Expires: